TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1927

No. 146

HENRY WILSON, F. A. WILSON, W. T. WILSON, ET AL., PETITIONERS,

vs.

PACIFIC MAIL STEAMSHIP COMPANY, STEAMSHIP "NEWPORT," HER ENGINES, ETC.; J. McKINNON, MASTER, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 19, 1926

CERTIORARI GRANTED JANUARY 10, 1927

No. 173

PACIFIC MAIL STEAMSHIP COMPANY, CLAIMANT OF THE STEAMSHIP "NEWPORT," HER ENGINES, ETC., AND J. McKINNON, MASTER OF SAID VESSEL, PETITIONERS,

vs.

HENRY WILSON, F. A. WILSON, W. T. WILSON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 28, 1927

CERTIORARI GRANTED MARCH 14, 1927

(32,311, 32,430)

(32,311, 32,430)

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vs.

PACIFIC MAIL STEAMSHIP COMPANY, STEAMSHIP "NEWPORT," HER ENGINES, ETC.; J. McKINNON, MASTER, ETC.

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Names and Addresses of Attorneys.

For Appellants:

FARNHAM P. GRIFFITHS, Esq.,
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Balfour Building, San Francisco, Calif.

For Appellees:

ANDROS, HENGSTLER & DORR,
Kohl Building, San Francisco, Calif.

STATEMENT OF CLERK UNDER RULE 4.

(Title of Court and Cause)

No. 1202 Civil.

PARTIES

Libelants: HENRY WILSON, F. A. WILSON, W. T. WILSON, LUCY W. KENDALL, A. KENDALL, A. J. PATTERSON, JAS. PENNYCOCK, O. BERTELSEN, J. S. HUTCHINSON, E. C. HUTCHINSON, C. E. ALLEN, A. B. JOHNSON, KATIE M. JOHNSON, MARIETT JOHNSON, A. HANSEN, CLARA A. BUCHHOLZ, H. W. JACKSON, L. EVERDING, FRANK GRAHAM, MARGARET A. WILSON, Trustee, CARRIE E. WILSON, J. H. WILSON, MARGARET A. WILSON, WM. C. WILSON, JAMES GRAHAM, B. P. NELSON, KARL ROHBERG, CHARLES S. SEMSEN, JAMES HAYES, C. H. ANDERSON, HARRY WALTON, W. SAARIS, GUST ANDERSON, GUST SAARINEN, WM. R. REILLY, LOUIS NORLOFF, JOHN McDONALD, WILSON BANGAY, ROBERT WHITE, GEORGE DOLAN, JOHN LEWIS, SETT STRAND.

Respondents: STEAMSHIP "NEWPORT", her engines, boilers, tackle, etc., J. McKINNON, Master of said vessel, and PACIFIC MAIL STEAMSHIP COMPANY, a corporation, owner of said vessel.

Claimant: PACIFIC MAIL STEAMSHIP COMPANY, a corporation.

Cross-Libelant: PACIFIC MAIL STEAMSHIP COMPANY, a corporation.

Cross-Respondents: HENRY WILSON, F. A. WILSON, W. T. WILSON, LUCY W. KENDALL, A. KENDALL, A. J. PATTERSON, JAS. PENNYCOCK, O. BERTELSEN, J. S. HUTCHINSON, E. C. HUTCHINSON, C. E. ALLEN, A. B. JOHNSON, KATIE M. JOHNSON, MARIETT JOHNSON, A. HANSEN, CLARA A. BUCHHOLZ, H. W. JACKSON, L. EVERDING, FRANK GRAHAM, MARGARET A. WILSON, Trustee, CARRIE E. WILSON, J. H. WILSON, MARGARET A. WILSON, WM. C. WILSON, JAMES GRAHAM, and B. P. NELSON.

PROCTORS

For Appellees (Libelants and Cross-Respondents below): ANDROS, HENGSTLER & DORR and F. W. DORR, Esq.

Kohl Building, San Francisco, California.

For Appellants (Respondents, Claimant and Cross-Libelants below):

FARNHAM P. GRIFFITHS, Esq., McCUTCHEN, OLNEY, MANNON & GREENE,

Balfour Building, San Francisco, California.

PROCEEDINGS

FILINGS—PROCEEDINGS.

DATE			
Month,	Day,	Year	
Dec	8,	1922	Fld. libel. Fld. stip for costs. Ent. same. Fld. agreement for release bond. Fld. praec. Iss'd Monition & copy & citation & 2 copies,
"	9,	"	Fld. claim of Pacific Mail S. S. Co. Fld. stip for costs. Ent. E. R. B.

"	11,	"	Fld. bond & stip for release of Steamer "Newport" Ent. E. R. Bk.
"	11,	"	Fld Monition & ent. ret. E. R. B. Fld citation & ent. ret. E. R. B.
"	27,	"	Fld stip for reduction of release bond. Fld stip & Bond on release replacing release bond prev. fld. Ent. stip E. R. B. Fld ord cancel release bo prev fld. Ent. ord.
Jan.	8,	1923.	Ent proc on proclam in admr. by crier & ord gntg. clmt & respondent 30 das to plead.
Feb.	7,	"	Fld exceptions to libel.
"	9,	"	Fld. depos Jno. McKeown, Charles S. Semsen & Karl Rohberg for libellant.
Sep.	12,	"	Fld notice of hrg exceps to libel & interrogs. Set for 9/17/23
"	17	"	Ent. ord contin 1 wk on excepts to libel & Interrogs.
"	24	"	Ent. proc on withdrawal of excepts to libel & interrogs. & ord allowing 10 days to answer by consent of counsel.
Oct	15,	"	Fld. stip & ord re amendmt of libel & amended libel. Ent ord E. O. B.
"	20	"	Fld cross libel of Pacific Mail S. S. Co. Fld answer of claimant & cross libel to amended libel.
Nov.	26	"	Fld. answers to cross libel & answers of Pac. Mail S. S. Co. Wit. to interrogs. Fld. Stip for $10,000.00 se-

curity on cross libel signed by Judge Bledsoe, Ent. Stip.

Jan. 9, 1924 Ent cause on T. T. Cal. Jan term 1924.

" 14, " Ent. ord setting for hrg 4/16/24

Mar 5, " Fld notice mo for postponement trial for 3/10/24

" 10 " Ent. proc on mo to postpone date of trial & ord denying

" 28 " Ent ord vacating ord settg for hrg 4/16/24 & cont 5/5/24 for settg.

May 5, 1924. Ord settg for hrg 5/6/24

" 6, " Ent proc on hrg. Fld 6 libell exibs. Fld 2 resp. exibs. Sw 1 libell wits. Sw. 5 resp. Wits. Ent. ord submitting. before Judge Paul J. McCormick

Sept. 10 " Ent. ord decree be drawn for libellant & cross respondents pursuant to memo opinion filed this day. Fld memo opinion. Ord libellant prepare decree.

" 15 " Fld stip for ref to U. S. Comr Francis Krull, N. D. Calif.

" 15 " Ent ord, signing filing & entering decree referring to Francis Krull, Esq., U. S. Comr. to take testimony & ascertain amounts due libellants & to report same to this court. Fld decree.

Feb. 19 1925 Fld petn Pac. Mail S. S. Co., for rehrg or modification of interloc decree.

"	24	"	Fld brief in oppos petn. for rehrg.
Aug	24	"	" report of U. S. Comr Krull on ref to ascertain & report due libellants. Fld. 8 vol's testy taken before Comr. Fld. mo for permis to offer fur testy on behalf libel. Fld Ex #1 to 105 on such proc. & copy of letter from Comr. (in vault, off 419, on table)
"	26	"	Fld excepts resp & claimant to report Comr.
Nov.	11	"	Fld excepts libellants to report U. S. Comr.
Jan.	18	1926	Fld notice of hrg exceptions.
"	25	"	Ent. proc on hrg exceptions of claimant & respondent to Comm'r report & ord. submittg before Judge Jaul J. McCormick,
Feb	19	"	Fld & ent ord overruling excepts to Comrs report & approv report & ord for decree und rule #26.
Feb	26	1926	Fld supple report U. S. Comr on reference
Mar	10	"	Ent ord sgng, flg & entrg decree. Fld decree.
"	15	"	Fld memo libellants costs. Fld notice of taxed costs.
"	16	"	Costs taxed at $807.04; Dock & ent costs.
Apr	19	"	Fld notice of motion for ord fixing bond on appeal & ent proc on hearing motion & ord that on respondent giving an additional bond in $35,-

000.00 security will be sufficient on appeal. Fld ord staying execution to May 1, 1926.

" 19 " Fld 4 stips exec on decree & judgt be stayed 10 days from (1) 3/20/26 (2) 3/29/26 (3) 4/8/26 (4) 4/19/26

" 23 " Fld ord fxg amt. of supersedeas bond on appeal $35000

Apr. 28, 1926 Fld assign of errors of P. M. S. S. Co., Fld notice of appeal. Fld & Ent supersedeas Bond for $35000.00. Fld bond for costs on appeal. Fld prae for apostles on appeal. Fld stip re printing trans.

May 1, " Fld. reporters trans of testy on trial. Fld stip re bond on appeal with ord thereon.

" 4, " Fld notice of filing supersedeas bond and cost bond on appeal.

" 21, " Order signed by Judge James extending time to file record in C. C. A. to & including June 10th.

IN THE SOUTHERN DIVISION OF THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

IN ADMIRALTY.

——— oOo ———

HENRY WILSON, F. A. WILSON and W. T. WILSON, a co-partnership, doing business under the firm name and style of WILSON BROS. & CO., Libelants, vs. STEAMSHIP "NEWPORT", her engines, boilers, tackle, etc., J. McKINNON, Master of said vessel, and PACIFIC MAIL STEAMSHIP COMPANY, a corporation, owner of said vessel, Respondents.	No. LIBEL IN REM AND PERSONAM FOR DAMAGES IN COLLISION. $151,000.00.

——— oOo ———

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA:

The libel of HENRY WILSON, F. A. WILSON and W. T. WILSON, a co-partnership, doing business under the firm name and style of WILSON BROS. & CO., suing in their own behalf as part owners of the steamship "Svea", and as managing owners of said steamship, in behalf of the other part owners of said vessel, and in behalf of the master, officers and crew of said ves-

sel, against the steamship "Newport", her engines, boilers, tackle, etc., and against J. McKinnon, master of said steamship "Newport", and against Pacific Mail Steamship Company, a corporation, owner of said steamship "Newport", and against all persons lawfully intervening for their interest in said steamship "Newport", in a cause of collision, civil and maritime, alleges as follows:

I.

That Henry Wilson, F. A. Wilson and W. T. Wilson, libelants herein, were, at all of the times herein mentioned, and now are, a co-partnership, doing business under the firm name and style of Wilson Bros. & Co., and were, at all of said times, and now are, part owners of the steamship "Svea", of 648 gross tons burden, or thereabouts, and of her engines, boilers, boats, tackle, apparel, furniture and appurtenances; and were, at all of said times, and now are, the managing owners of said steamship "Svea", her engines, boilers, boats, tackle, apparel, furniture and appurtenances, and are suing herein in their own behalf as part owners of said vessel, and as managing owners in behalf of the other part owners of said vessel, and in behalf of the master, officers and crew of said vessel.

II.

That the steamship "Newport", respondent herein, was at all of the times herein mentioned, and now is, an American vessel of 2643 gross tons burden, or thereabouts, and is now lying in the harbor of Los Angeles, within the Southern District of California, and within the jurisdiction of this Honorable Court.

III.

Upon information and belief, that J. McKinnon, respondent herein, was, at all of the times herein mentioned, and now is, master of said steamship "Newport"; and that Pacific Mail Steamship Company, a corporation, respondent herein, was, at all of said times, and now is, the owner of said steamship "Newport".

IV.

That heretofore, to-wit: on the 29th day of November, 1922, at about 9:53 A. M. on said day, while said steamship "Svea" was bound on a voyage from the port of Ventura, in the State of California, to the port of Aberdeen, in the State of Washington, and while off the coast of California, at a point about twelve (12) miles westerly from Point Buchon, said vessel was run into by said steamship "Newport"; that as a result of said collision said steamship "Svea" was so badly damaged that she filled with water and capsized before she could make port; and in so far as libelants are now informed is an almost total loss.

V.

That said steamship "Svea" was, at the time of said collision, and at all times prior thereto during said voyage, and at the commencement of said voyage, in all respects seaworthy, and properly and efficiently officered, manned, supplied, equipped and furnished, and well and sufficiently fitted and supplied with suitable engines, boilers, machinery, tackle, apparel, appliances and furniture, all in good order and condition, and suitable for the business and voyage in which she was engaged; that the owners of said steamship had at all of said times exercised due diligence to make said vessel in all

respects seaworthy, and properly and efficiently officered, manned, equipped, supplied and furnished, and well and sufficiently fitted and supplied with suitable engines, boilers, tackle, apparel, appliances and furniture.

VI.

That at the time of said collision the weather was fair and clear; that said steamship "Svea" was at said time, and had been for about thirty-eight (38) minutes prior thereto, proceeding on a course Northwest by North one half North magnetic, at a speed of about seven and one-half (7½) knots per hour; that said steamship "Newport" was proceeding on an East Southeasterly course, at a high rate of speed, and was at all of said times on the port bow of the "Svea", and at all of said times the "Svea" was on the starboard side of the "Newport"; that at all of said times said steamship "Svea" held her course and speed, and complied with all rules of navigation, and was at all of said times navigated with due caution and skill by the master and officers thereof; that said collision was not caused by any fault, negligence or want of due care on the part of libelants, or the master, or the officers, or crew of said steamship "Svea", or any of them.

VII.

Libelants allege that said collision and the consequent damages to said steamship "Svea", and to her owners, master, officers and crew, were entirely due to the fault of the respondents, and particularly those in charge of the navigation of said steamship "Newport", and that said vessel was at fault in the following, among other particulars:

FIRST: Upon information and belief, that said vessel did not have a proper or competent officer on watch

at the time of said collision, and immediately prior thereto.

SECOND: Upon information and belief, that said vessel did not have a proper or competent helmsman at the steering wheel of said vessel at the time of said collision, or immediately prior thereto.

THIRD: Upon information and belief, that said steamship "Newport" at, and immediately prior, to the time of said collision, did not have a proper and competent lookout on watch.

FOURTH: That said steamship "Newport" at, and immediately prior, to the time of said collision, was violating Article 19 of the International Rules for Preventing Collisions, in that said vessel having the steamship "Svea" on the starboard side of said steamship "Newport" did fail to keep out of the way of said steamship "Svea".

FIFTH: That said steamship "Newport" at, and immediately prior, to the time of said collision was violating Article 22 of said International Rules for Preventing Collisions, in that it failed to pass astern of said steamship "Svea".

SIXTH: That said steamship "Newport" at, and immediately prior, to the time of said collision was violating Article 23 of said International Rules for Preventing Collisions, in that while approaching said steamship "Svea", and while it was obliged by the said International Rules to keep out of the way of said steamship "Svea", it failed to slacken its speed, and did fail to stop, and did fail to reverse its engines.

SEVENTH: That said steamship "Newport" was negligent in other and further particulars, of which the libelants are not at present advised, but when so

advised will beg leave to offer proof of said negligent acts, and to amend their libel to conform with such facts.

VIII.

That after said collision the master of the steamship "Svea" signalled to the steamship "Newport" for assistance, but the master, or other person in charge of the steamship "Newport" failed and neglected to stay by the steamship "Svea" until said master, or other person had ascertained that said steamship "Svea" had no need of assistance, or further assistance, and failed and neglected to stay by said steamship "Svea" at all, and failed and neglected to render any assistance to said steamship "Svea", although the latter was in a badly damaged and sinking condition, and was in need of such assistance; and that the master, or other person in charge of said steamship "Newport", at the time of said collision, and at all times thereafter, failed and neglected to give to the master, or any other person in charge of the steamship "Svea", or to any other person on board said vessel, the name of the steamship "Newport", her port of registry, or the port or place to which she belonged, or the name of the port and place from which, and to which she was bound, or any of them,

Libelants further allege upon information and belief, that said steamship "Newport" could have stood by said steamship "Svea" after said collision without serious danger to said steamship "Newport", or to her crew, or to her passengers, and that there was no reasonable cause for such failure and neglect to stay by, or for the failure and neglect to render assistance, or for the failure and neglect to give the name of the vessel,

port of registry, or other information, as provided in the Act of Congress of September 4, 1890, 26 Stat. 425.

IX.

That by reason of said collision and the resulting damage to said steamship "Svea", and by reason of the loss of the clothing, personal effects, tools, utensils and navigational instruments of the master, officers and crew of said steamship "Svea", and on account of the expenses arising out of said collision, libelants have been damaged in a sum which they are at present unable to state with accuracy, but which upon information and belief, they aver will amount of upwards of One Hundred and Fifty-One Thousand ($151,000.00) Dollars, and that no part of said damage has been paid.

X.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, libelants pray that process in due form of law, according to the course of this Honorable Court, in causes of admiralty and maritime jurisdiction, may issue against the said steamship "Newport", her engines, boilers, boats, tackle, apparel, furniture and appurtenances, and that said J. McKinnon and Pacific Mail Steamship Company, a corporation, may be personally cited to appear and answer upon oath, all and singular, the matters aforesaid, and that this Honorable Court would be pleased to decree payment to libelants of the damages aforesaid, with interest and costs, and that said vessel, her engines, boilers, boats, tackle, apparel, furniture and appurtenances, may be condemned and sold to pay the amount due to the libelants, with

interest and costs, and that libelants may have such other and further relief in the premises as in law and justice they may be entitled to receive.

Andros & Hengstler
Proctors for Libelants.

Verified.

INTERROGRTORIES PROPOUNDED BY LIBELANTS TO RESPONDENTS TO BE ANSWERED UNDER OATH.

FIRST: Was the Pacific Mail Steamship Company, a corporation, the owner of the steamship "Newport" on the 29th day of November, 1922? If not, who was the owner of said vessel.

SECOND: Who was the master of said vessel on the 29th day of November, 1922?

THIRD: Upon what voyage was said vessel bound on the 29th day of November, 1922?

FOURTH: What was the position of said vessel at 9:30 A. M. on the 29th day of November, 1922?

FIFTH: What was the true or magnetic course of said vessel at 9:30 A. M. on the 29th day of November, 1922?

SIXTH: What was the speed of said vessel at 9:30 A. M. on the 29th day of November, 1922?

SEVENTH: What time did the collision between the steamship "Newport" and the steamship "Svea" take place?

EIGHTH: What changes of speed, if any, in the engines of the steamship "Newport" were made after 9:30 A. M. on the 29th day of November, 1922, and

prior to the time of the collision with the steamship "Svea"?

NINTH: What changes of course, if any, were made by the steamship "Newport" after 9:30 A. M. on the 29th day of November, 1922, and prior to the time of said collision?

TENTH: What is the name of the officer or person, if any, who was on watch on the steamship "Newport" at the time of said collision and for half an hour prior thereto?

ELEVENTH: What were the weather conditions at the time of said collision and for half an hour immediately prior thereto?

TWELFTH: Was there any fog or haze at the time of said collision or during the half hour immediately prior thereto?

THIRTEENTH: When was the steamship "Svea" first sighted, if at all, by those in charge of the navigation of the steamship "Newport"?

FOURTEENTH: What was the bearing of the steamship "Svea" from the steamship "Newport" when first sighted, if the steamship "Svea" was sighted?

FIFTEENTH: Was not the "Svea" at all times on the starboard bow or starboard side of the "Newport"?

SIXTEENTH: If your answer to the fifteenth interrogatory is in the negative, state when the "Svea" was on the starboard side or starboard bow of the "Newport", and when, if at any time, she was not on the starboard bow or starboard side of the "Newport"?

SEVENTEENTH: Did not the "Newport" hit the port side of the "Svea" about amidships? If not, state where the "Newport" did hit the "Svea".

EIGHTEENTH: What assistance, if any, was rendered by the "Newport" to the "Svea" after the collision?

NINETEENTH: Did the "Newport" stand by the "Svea" after the collision?

TWENTIETH: If the answer to the nineteenth interrogatory is in the affirmative, state how long the "Newport" stood by the "Svea".

TWENTY-FIRST: If the answer to the nineteenth interrogatory is in the affirmative state the relative positions of the two vessels while the "Newport" was standing by?

TWENTY-SECOND: Were any offers of assistance made by the "Newport" to the "Svea"?

TWENTY-THIRD: What whistle signals, if any, were made by either vessel at the time of the collision, and prior thereto while said vessels were within hearing of each other?

TWENTY-FOURTH: What whistle signals were made by either vessel after the collision, and while the vessels were in hearing of each other?

[Endorsed]: No. 1202 Civil District Court of the United States for the Southern District of California, In Admiralty. Henry Wilson, F. A. Wilson and W. T. Wilson, a co-partnership doing business under the firm name and style of Wilson Bros. & Co., Libelants vs. Steamship "Newport" her engines, boilers, tackle, etc., J. McKinnon Master of said vessel and Pacific Mail Steamship Company, a corporation, owner of said vessel, Respondents. Libel in rem and personam for damages in collision, $151,000.00. Filed Dec. 8, 1922. Chas. N. Williams, clerk, by R. S. Zimmerman, deputy clerk.

Andros & Hengstler, Proctors for Libelants. Kohl Building, San Francisco, Cal.

[Title of Court and Cause.]

CLAIM OF PACIFIC MAIL STEAMSHIP COMPANY, a corporation.

NOW, before this Honorable Court appears PACIFIC MAIL STEAMSHIP COMPANY, a corporation, owner of the Steamer "NEWPORT" her engines, boilers, tackle, etc., by F. S. DURIE, its general agent, and makes claim to the said ship "NEWPORT", her engines, boilers, tackle, etc., and avers that it is now in possession of said ship "NEWPORT", her engines, boilers, tackle, etc., and that it is the true and bonafide owner of said Steamer "NEWPORT", her engines, boilers, tackle, etc., and that no other person or persons are the owner or owners thereof.

WHEREFORE, it prays to defend the said suit accordingly.

PACIFIC MAIL STEAMSHIP COMPANY,
By F. S. Durie
Its General Agent.

STATE OF CALIFORNIA,)
County of Los Angeles.) SS.

F. S. DURIE, being first duly sworn, deposes:

That Pacific Mail Steamship Company, a corporation, is the true and bonafide owner of the Steamer "NEWPORT", her engines, boilers, tackle, etc., against which suit has been commenced by HENRY WILSON, F. A. WILSON and W. T. WILSON, co-partners doing business under the firm name and style of WILSON BROTHERS AND COMPANY, a partnership, Libel-

ants, and that no other person is the owner or owners thereof; that for the purpose of this suit deponent is general agent of the said owner and is duly authorized by said owner to put in this claim, and deponent further says that at the time of the commencement of this suit the said Steamer "NEWPORT", her engines, boilers, tackle, etc., was in the lawful possession of said owner.

F. S. Durie

Subscribed and sworn to before me
this 9th day of December, 1922,
Cecil Betz (Seal)
Notary Public in and for the County
of Los Angeles, State of California.

[Endorsed]: No. 1202 Civil. In the District Court of the United States, Southern District of California, Southern Division. Henry Wilson, S. A. Wilson and W. T. Wilson, etc., Libelants, vs. the Steamer "Newport" etc., et al., Respondents. Claim of Pacific Mail Steamship Co., a corporation. Filed Dec. 9, 1922. Chas. N. Williams, clerk, by R. S. Zimmerman, deputy clerk. E. R. Young, Attorney at Law, 802-5 Haas Building. New address 1222-28 Stock Exchange Bldg. Los Angeles, California. C. E. Spencer, Attorney for Claimant.

At a stated term, to wit: The July Term, A. D. 1923 of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 24th day of September, in the year of Our Lord one thousand nine hundred and twenty-three.

Present:

The Honorable BENJAMIN F. BLEDSOE, District Judge.

Henry Wilson and W. T. Wilson, a co-partnership doing business under the firm name and style of Wilson Bros. & Co. Libellants vs. Steamship "Newport" her engines, boilers, tackle, etc., J. McKinnon, Master of said vessel, and Pacific Mail Steamship Co., a corp., owner of said vessel, Respondents.	No. 1202-T Civil.

This cause coming on at this time for hearing of exceptions to libel and to Interrogatories; H. R. Kelly, Esq., being present in court for E. R. Young, Esq. proctor of record for the respondents; it is by the court ordered, pursuant to consent of respective parties, that the exceptions to libel and to Interrogatories be withdrawn and that respondent be given ten days to answer.

IN THE SOUTHERN DIVISION OF THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA. IN ADMIRALTY

HENRY WILSON, F. A. WILSON and W. T. WILSON, a co-partnership, doing business under the firm name and style of WILSON BROS. & CO., Libelants, vs. STEAMSHIP "NEWPORT" her engines, boilers, tackle, etc., J. McKINNON, Master of said vessel, and PACIFIC MAIL STEAMSHIP COMPANY, a corporation, owner of said vessel, Respondents.	No. 1202 Civil STIPULATION RE AMENDMENT OF LIBEL

IT IS HEREBY STIPULATED that the libel filed herein by Henry Wilson, F. A. Wilson and W. T. Wilson, a co-partnership doing business under the firm name and style of Wilson Bros. & Co., suing in their own behalf as part owners of the steamship "Svea", and as managing owners of said steamship, in behalf of the other part owners of said vessel, and in behalf of the master, officers and crew of said vessel, against the steamship "Newport", her engines, boilers, tackle, etc., and against J. McKinnon, master of said steamship "Newport", and against Pacific Mail Steamship Company, a corporation, owner of said steamship "Newport", and against all persons lawfully intervening for their interest in said steamship "Newport", may be amended by inserting the names of said part owners, master, officers and crew of said vessel in whose behalf said action was brought, and that said amendment may

and shall be deemed hereby to have been made
[A. & H.]

be accomplished by changing page 1 and page 2 of said libel down to paragraph II thereof, to read as follows:

"IN THE SOUTHERN DIVISION OF THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA IN ADMIRALTY

HENRY WILSON, F. A. WILSON, W. T. WILSON, LUCY W. KENDALL, A. KENDALL, A. J. PATTERSON, JAS. PENNYCOCK, O. BERTELSEN, J. S. HUTCHINSON E. C. HUTCHINSON, C. E. ALLEN, A. B. JOHNSON, KATIE M. JOHNSON, MARIETT JOHNSON, A. HANSEN, CLARA A. BUCHHOLZ, H. W. JACKSON, L. EVERDING, FRANK GRAHAM, MARGARET A. WILSON, Trustee, CARRIE E. WILSON, J. H. WILSON, MARGARET A. WILSON, WM. C. WILSON, JAMES GRAHAM, B. P. NELSON, KARL ROHBERG, CHARLES S. SEMSEN, JAMES HAYES, C. H. ANDERSON, HARRY WALTON, W. SAARIS, GUST ANDERSON, GUST SAARINEN, WM. R. REILLY, LOUIS NORLOFF, JOHN McDONALD, WILSON BANGAY, ROBERT WHITE, GEORGE DOLAN, JOHN LEWIS, SETT STRAND,	No. 1202 Civil AMENDED LIBEL
Libelants,	
vs.	
STEAMSHIP "NEWPORT", her engines, boilers, tackle, etc., J. McKINNON, Master of said vessel, and PACIFIC MAIL STEAMSHIP COMPANY, a corporation, owner of said vessel,	
Respondents.	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA:

The libel of Henry Wilson, F. A. Wilson, W. T. Wilson, Lucy W. Kendall, A. Kendall, A. J. Patterson, Jas. Pennycock, O. Bertelsen, J. S. Hutchinson, E. C. Hutchinson, C. E. Allen, A. B. Johnson, Katie M. Johnson, Mariett Johnson, A. Hansen, Clara A. Buchholz, H. W. Jackson, L. Everding, Frank Graham, Margaret A. Wilson, Trustee, Carrie E. Wilson, J. H. Wilson, Margaret A. Wilson, Wm. C. Wilson, James Graham, B. P. Nelson, Karl Rohberg, Charles S. Semsen, James Hayes, C. H. Anderson, Harry Walton, W. Saaris, Gust Anderson, Gust Saarinen, Wm. R. Reilly, Louis Norloff, John McDonald, Wilson Bangay, Robert White, George Dolan, John Lewis, Sett Strand, against the steamship "Newport", her engines, boilers, tackle, etc., and against J. McKinnon, master of said steamship "Newport", and against Pacific Mail Steamship Company, a corporation, owner of said steamship "Newport", and against all persons lawfully intervening for their interest in said steamship "Newport", in a cause of collision, civil and maritime, alleges as follows:

I.

That the libelants, Henry Wilson, F. A. Wilson, W. T. Wilson, Lucy W. Kendall, A. Kendall, A. J. Patterson, Jas. Pennycock, O. Bertelsen, J. S. Hutchinson, E. C. Hutchinson, C. E. Allen, A. B. Johnson, Katie M. Johnson, Mariett Johnson, A. Hansen, Clara A. Buchholz, H. W. Jackson, L. Everding, Frank Graham, Margaret A. Wilson, Trustee, Carrie E. Wilson, J. H. Wilson,

Margaret A. Wilson, Wm. C. Wilson, James Graham, B. P. Nelson were, at all of the times herein mentioned, and now are the owners of the steamship "Svea", of 648 gross tons burden or thereabouts, and of her engines, boilers, boats, tackle, apparel, furniture and appurtenances, in the following shares, to wit: Henry Wilson 16/64; F. A. Wilson 3/64; W. T. Wilson 2/64; Lucy W. Kendall 1/64; A. Kendall 2/64; A. J. Patterson 1/64; Jas. Pennycock 1/64; O. Bertelsen 2/64; J. S. Hutchinson 2/64; E. C. Hutchinson 2/64; C. E. Allen 2/64; A. B. Johnson 2/64; Katie M. Johnson 1/64; Mariett Johnson 1/64; A. Hansen 3/64; Clara A. Buchholz 2/64; H. W. Jackson 2/64; L. Everding 1/64; Frank Graham 1/64; Margaret A. Wilson, Trustee 4/64; Carrie E. Wilson 1/64; J. H. Wilson 1/64; Margaret A. Wilson 4/64; Wm. C. Wilson 2/64; James Graham 1/64; B. P. Nelson 4/64; that libelant, Karl Rohberg, was at all of the times herein mentioned, the master of said steamship "Svea"; that libelants, Charles S. Semsen, James Hayes, C. H. Anderson, Harry Walton, W. Saaris, Gust Anderson, Gust Saarinen, Wm. R. Reilly, Louis Norloff, John McDonald, Wilson Bangay, Robert White, George Dolan, John Lewis, Sett Strand, were at all of the times herein mentioned, the officers and crew of said steamship "Svea"."

* * * * * *

IT IS FURTHER STIPULATED that after said amendment said cause may proceed in the names of the libelants set forth in the amended libel, in whose behalf the original libel was filed, with the same force and effect

as though said names and each thereof had been set forth in said original libel.

Dated: October 10, 1923.

Andros & Hengstler

Proctors for Libelants.

Farnham P. Griffiths

McCutchen, Olney, Mannon & Greene

Proctors for Respondents and Claimant.

IT IS SO ORDERED:

Wm. P. James

Judge of the United States District Court.

[Endorsed]: No. 1202 Civil. District Court of the United States, for the Southern District of California, In Admiralty. Henry Wilson, et al., Libelants vs. Steamship "Newport," etc., J. McKinnon et al., respondents. Stipulation re amendment of Libel. Filed Oct. 15, 1923. Chas. N. Williams, Clerk, by L. J. Cordes, Deputy Clerk. Andros & Hengstler, Proctors for Libelants, Kohl Building, San Francisco, Cal.

IN THE SOUTHERN DIVISION OF THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA IN ADMIRALTY

PACIFIC STEAMSHIP COMPANY, a corporation, Claimant, Respondent and Cross-Libelant, vs. HENRY WILSON, F. A. WILSON, W. T. WILSON, LUCY W. KENDALL, A. KENDALL, A. J. PATTERSON, JAS PENNYCOCK, O. BERTELSEN, J. S. HUTCHINSON, E. C. HUTCHINSON, C. E. ALLEN, A. B. JOHNSON, KATIE M. JOHNSON, MARIETT JOHNSON, A. HANSEN, CLARA A. BUCHHOLZ, H. W. JACKSON, L. EVERDING, FRANK GRAHAM, MARGARET A. WILSON, Trustee, CARRIE E. WILSON, J. H. WILSON, MARGARET A. WILSON, Wm. C. WILSON, JAMES GRAHAM and B. P. NELSON, Libelants and Cross-Respondents.	No. 1202 CIVIL

CROSS-LIBEL.

I.

That at all times herein mentioned claimant, respondent and cross-libelant, Pacific Mail Steamship Company, was a corporation duly organized and existing under and by virtue of the laws of the State of New York, and was at all of said times the owner and operator of the Steamship "Newport."

II.

That at all times hereinafter mentioned Henry Wilson, F. A. Wilson, W. T. Wilson, Lucy W. Kendall, A. Kendall, A. J. Patterson, Jas. Pennycock, O. Bertelsen, J. S. Hutchinson, E. C. Hutchinson, C. E. Allen, A. B. Johnson, Katie M. Johnson, Mariett Johnson, A. Hansen, Clara A. Buchholz, H. W. Jackson, L. Everding, Frank Graham, Margaret A. Wilson, Trustee, Carrie E. Wilson, J. H. Wilson, Margaret A. Wilson, Wm. C. Wilson, James Graham and B. P. Nelson were owners of the Steamship "Svea."

III.

That at 9:53 A. M. on the 29th day of November, 1922, the Steamers "Newport" and "Svea" were in collision off the Coast of California at a point about 12 miles westerly from Pt. Buchon. That at the time of, and during the hour immediately prior to said collision, the weather was fair and clear, and until less than a minute immediately preceding the collision said "Newport" was proceeding on course S. 79 E. (Magnetic) at a speed of between 9 and 10 knots per hour. That during said time said Steamer "Svea," on information and belief, was proceeding on course N. W. by N. 1/2 N. (Magnetic). Cross-libelant admits that said Steamer "Newport" was in fault in respect to said collision in that she violated Articles 19, 22 and 23, but on information and belief alleges that said collision was at least not due solely to said faults but was proximately caused or contributed to by faults on the part of the "Svea" and those in charge of her navigation in that, among other things:

(1) That she did not have on watch proper and competent officers attending to their duties;

(2) That she failed to have a competent lookout properly stationed;

(3) That she failed to reverse her engines until the instant of collision and too late to avoid the collision;

(4) That she failed to alter her course until the instant of collision and too late to avoid the collision;

(5) That she violated Article 28 of the International Rules for Preventing Collisions in that she did not blow the signals required by said article, and blew signals in violation of said article;

(6) That approaching the "Newport," which had disregarded her signals and which gave no indication of heeding them, she failed to stop or slacken speed or take any precaution to avoid the impending collision;

(7) That she violated Article 27 of the International Rules for Preventing Collisions in that she maintained her course and speed after receiving clear indications from the "Newport" that she, the "Newport," intended to do nothing, and after a time when the "Newport" could no longer avoid the collision by her own action and yet during which the "Svea" could have avoided the collision by a proper use of her helm and engines;

(8) That said Steamship "Svea" and those in charge of her navigation were negligent in other and further particulars of which cross-libelant is not at present advised but when so advised will beg leave to offer proof of said negligent acts and will amend such cross-libel to conform to such facts.

IV.

That said "Newport" was an iron vessel and at the time of said collision was heavy laden, had a large number of passengers and a large crew, and in said collision her bow was badly crushed and the obvious con-

dition was one which caused the master of said "Newport" great concern for the safety of the vessel, her passengers, cargo and crew; that the Steamer "Svea" was a wooden vessel and at the time of said collision, on information and belief, was proceeding light, with little or no cargo, no passengers and but a small crew; that the damage sustained by the "Svea" by reason of said collision was apparently not serious and she was apparently not in need of such immediate assistance as was the "Newport" under the circumstances, and in fact, on information and belief, such was the judgment of those in charge of said "Svea."

That notwithstanding the premises, said Steamer "Svea," her master and those in charge of her, failed and neglected to stay by said Steamship "Newport" until the master or other person had ascertained that said Steamship "Newport" had no need of assistance, or further assistance, and failed and neglected to stay by said Steamship "Newport" and failed and neglected to render any assistance to said Steamship "Newport," and at said times and at all times thereafter failed and neglected to give the master or any other person in charge of said Steamship "Newport," or to any one person on board said vessel, the name of said Steamship "Svea," her port of registration or the port or place to which she belonged, or the name of the port from which and to which she was bound, or any of them.

V.

That by reason of said collision and the resulting damage to said Steamship "Newport," and on account of the expenses resultant therefrom, and by reason of the damages for detention of said vessel, due to and arising

out of said collision, cross-libelant has been damaged in the sum of approximately Fifty-five Thousand (55,000) Dollars, no part of which damage has been paid.

VI

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, cross-libelant prays that libelants and cross-respondents may be cited to appear and make answer to this cross-libel, and that they be required to give security in the usual form to cross-libelant, in accordance with its stipulation heretofore filed herein for the damages claimed by this cross-libelant, and that all proceedings upon the original libel herein be stayed until such security be given; that libelants and cross-respondents be further required to answer on oath this cross-libel and the matters therein contained, and that this Honorable Court may be pleased to decree to cross-libelant the amount due it, with interest and costs, and that cross-libelant may have such other and further relief as in law and justice it may be entitled to receive.

Farnham P. Griffiths
McCutchen, Olney, Mannon & Greene
Proctors for Cross-Libelant.

Verified.

INTERROGATORIES PROPOUNDED TO LIBELANTS, TO BE ANSWERED ON OATH.

1. What is the length, beam, depth, gross tonnage and net registered tonnage of the Steamship "Svea?"

2. At what time on the morning of November 29, 1923, was the Steamer "Newport" first sighted by those in charge of the navigation of the "Svea?"

3. With reference to the bow of said "Svea" how did said "Newport" bear at the time said "Newport" was first sighted?

4. How far away from said "Svea" was said "Newport" when the "Newport" was first sighted?

5. What whistle signals were blown on the "Svea" from the time said "Newport" was first sighted until the time of collision, and at what time was each blown and how far apart were the vessels at each of such times?

6. What changes of course or helm were made by said Steamship "Svea" from the time said "Newport" was first sighted until the said collision, and at what time was each executed, and how far apart were the vessels at each of such times?

7. What changes in speed or direction of the engines of said Steamship "Svea" from the time said "Newport" was first sighted until the time of said collision, and at what time was each such change made and how far apart were the said vessels at each of such times?

8. At the time of said collision was said "Svea" light or heavy loaded, or, if partially loaded, to what extent?

9. Immediately before said collision what was the draft of said "Svea" forward and aft?

10. Loaded as she was at the time of said collision, and proceeding at a speed of 7-½ knots through the water, how long would it take said Steamer "Svea" to come to a stop in smooth water, and how far would she travel, after putting her engines at full speed astern?

11. Going at a speed of 7-½ knots per hour through the water, what would be the radius of the circle described by the Steamer "Svea" on putting her helm hard astarboard and leaving it there until she completed the circle?

12. What result would be attained under the question put in Interrogatory No. 11 should the helm be put hard aport, under the same conditions?

13. Were there any changes in the bearing of the said "Newport" from the "Svea" from the time she was sighted until the time of collision?

14. If you answer the preceding interrogatory in the affirmative, state what changes occurred and when and how far apart the vessels were when each change was discovered by those in charge of said "Svea."

15. Were any signals from the "Newport" heard on board the "Svea" before the collision? If so, what signals were heard, at what time was each heard and how far apart were the vessels at such time?

Farnham P. Griffiths
McCutchen, Olney, Mannon & Greene
Proctors for Claimant,
Respondent and Cross-Libelant.

[Endorsed]: No. 1202 Civil. In the Southern Division of the United States District Court for the Southern District of California. In Admiralty. Pacific Mail Steamship Company, a corporation, claimant, Respondent and Cross-Libelant, vs. Henry Wilson, F. A. Wilson et al., Libelants and Cross-Respondents. Cross-Libel. Service of the within cross-libel and interrogatories propounded to libelant and receipt of a copy is hereby admitted this 18th day of October, 1923. Andros & Hengstler. Filed Oct. 20, 1923. Chas. N. Williams clerk, by L. J. Cordes, deputy clerk. McCutchen, Olney, Mannon & Greene Proctors for Claimant, Respondent and Cross Libelant. San Francisco, California.

IN THE SOUTHERN DIVISION OF THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA IN ADMIRALTY

HENRY WILSON, F. A. WILSON W. T. WILSON, LUCY W. KENDALL, A. KENDALL, A. J. PATTERSON, JAS. PENNYCOCK, O. BERTELSEN, J. S. HUTCHINSON, E. C. HUTCHINSON, C. E. ALLEN A. B. JOHNSON, KATIE M. JOHNSON, MARIETT JOHNSON, A. HANSEN, CLARA A. BUSHHOLZ, H. W. JACKSON, L. EVERDING, FRANK GRAHAM, MARGARET A. WILSON, Trustee, CARRIE E. WILSON, J. H. WILSON, MARGARET A. WILSON, WM. C. WILSON, JAMES GRAHAM, B. P. NELSON, KARL ROHBERG, CHARLES S. SEMSEN, JAMES HAYES, C. H. ANDERSON, HARRY WALTON, W. SAARIS, GUST ANDERSON, GUST SAARINEN, WM. R. REILLY, LOUIS NORLOFF,, JOHN McDONALD, WILSON BANGAY, ROBERT WHITE, GEORGE DOLAN, JOHN LEWIS, SETT STRAND, Libelants,	)	No. 1202 CIVIL
vs.	)	
STEAMSHIP "NEWPORT," her engines, boilers, tackle, etc., J. McKINNON, Master of said vessel, and PACIFIC MAIL STEAMSHIP COMPANY, a corporation, owner of said vessel, Respondents.	)	
PACIFIC MAIL STEAMSHIP COMPANY, a corporation, Claimant.	)	

ANSWER OF CLAIMANT AND RESPONDENTS TO AMENDED LIBEL.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES DISTRICT COURT, FOR THE SOUTHERN DISTRICT OF CALIFORNIA:

The answer of Pacific Mail Steamship Company, claimant and respondent above named, and J. McKinnon, respondent above named, to the amended libel of Henry Wilson, et al., against Pacific Mail Steamship Company, a corporation, the Steamship "Newport," her engines, boilers, tackle, etc., and against J. McKinnon, admits, denies and alleges as follows:

I.

Answering unto the allegations of Article I of said amended libel, claimant and respondents admit the allegations thereof in respect to the ownership of said Steamship "Svea," but allege they are ignorant concerning the remaining allegations of said article, wherefore they call for strict proof thereof, so far as may be material.

II.

Answering unto the allegations of Article II of said amended libel, admit the same.

III.

Answering unto the allegations of Article III of said amended libel, admit the same.

IV.

Answering unto the allegations of Article IV of said amended libel, admit the same except that they allege they are ignorant concerning the allegations that as a result of said collision said "Svea" was so badly dam-

aged that she filled with water and capsized before she could make port, wherefore they demand strict proof of said allegations so far as may be material, and except also that they allege they are ignorant concerning the allegation that said "Svea" was almost a total loss, wherefore they demand strict proof thereof so far as may be material.

V.

Answering unto the allegations of Article V of said amended libel, deny each and every, all and singular, the allegations of said article.

VI.

Answering unto the allegations of Article VI of said amended libel, said claimant and respondents admit that at the time of said collision the weather was fair and clear. Allege that they are ignorant as to the exact course and speed of the said Steamer "Svea," wherefore they call for strict proof thereof so far as the same may be material. Deny that said Steamer "Newport" was proceeding on an East Southeasterly course, and in this respect allege that the course of said "Newport" at said time was South 79° East. Deny that said "Newport" was proceeding at a high rate of speed. Admit that at all of said times said "Newport" was on the port bow of the "Svea" and that at all of said times the Steamer "Svea" was on the starboard side of the "Newport." Allege that they are ignorant concerning the allegation that at all of said times said Steamship "Svea" held her course and speed, and demand strict proof thereof. Deny that at all of said times said "Svea" complied with all the rules of navigation, or was at all of said times navigated with due caution and skill by the master and officers thereof, and in this respect allege

that said Steamship "Svea" was negligently navigated, as more particularly alleged in the cross-libel on file herein. Deny that said collision was not caused by any fault, negligence or want of due care on the part of libelants or the master or officers or crew of said Steamship "Svea" and in this respect allege that said collision was proximately caused or contributed to by the negligence of those in charge of the navigation of said Steamship "Svea," as more particularly alleged in the cross-libel on file herein.

Except as hereinbefore expressly admitted, deny each and every, all and singular, the allegations of said Article VI.

VII.

Answering unto the allegations of Article VII of said amended libel, claimant and respondents deny that said collision or the consequent damages to said Steamship "Svea" or to her owners, master, officers or crew, were due entirely to the fault of respondents or those in charge of the navigation of said Steamship "Newport." Deny that respondents, J. McKinnon or Pacific Mail Steamship Company, personally were guilty of the faults alleged in said article or any others, or at all.

Deny that at the said alleged or any time said Steamer "Newport" did not have a proper or competent officer on watch.

Deny that at said alleged or any time said Steamer "Newport" did not have a proper or competent helmsman at the steering wheel.

Deny that at the said alleged or any time said Steamship "Newport" did not have a proper and competent lookout.

Admit that said Steamship "Newport" violated Articles 19, 22 and 23 of the International Rules for Preventing Collisions, as alleged in subdivisions numbered fourth, fifth and sixth of said Article VII.

Deny each and every, all and singular, the allegations of subdivision numbered seventh of said Article VII, and except as hereinbefore expressly admitted, deny each and every, all and singular, the allegations of said Article VII. Allege that said collision and the consequent damages to both said Steamship "Svea" and said Steamship "Newport," their owners, officers and crews, were proximately caused or contributed to by the fault of the said Steamship "Svea" and those in charge of her navigation, as alleged in the cross-libel filed in this court and cause.

VIII.

Answering unto the allegations of Article VIII of said amended libel, claimant and respondents admit that said Steamship "Newport" did not render any assistance to said "Svea," nor did she give to anyone on board said vessel her name, port or registry, or port or place to which she belonged, or the name of the port and place from which and to which she was bound, except so far as the same was conveyed by information from signs painted and printed upon her.

Except as herein expressly admitted, deny each and every, all and singular, the allegations of said Article VIII.

Allege that said Steamer "Svea" was a wooden vessel and at the time of said collision was light, carried no passengers, but a small crew, was apparently not seriously damaged and not in serious danger, and requested no assistance from, or information concerning

the said "Newport." That, on the other hand, said Steamer "Newport" was an iron vessel, heavy loaded, carried a large number of passengers and a large crew, and had her bow badly crushed in and was at first thought to be in grave danger of sinking. That by reason of the circumstances it would have been subjecting said vessel, her passengers, cargo, officers and crew to an unreasonable hazard and danger for her to remain by the "Svea" any longer than she did remain.

IX.

Answering unto the allegations of Article IX of said amended libel, admit the allegation that no part of said alleged damage has been paid by claimant or respondents, but allege that they are ignorant concerning the remaining allegations of said Article IX, wherefore they call for strict proof thereof so far as the same may be material.

X.

Answering unto the allegations of Article X of said amended libel, deny that all and singular, or all or singular, the premises are true, but admit the same are within the admiralty and maritime jurisdiction of this Honorable Court.

WHEREFORE, said claimant and respondents pray that the amended libel of libelants may be dismissed or that in the alternative, if both vessels be found at fault herein, that a decree for damages be rendered in accordance with the principles of cross-liabilities applicable in such cases, and for such other and further relief as to the court may be deemed proper.

Farnham P. Griffiths
McCutchen, Olney, Mannon & Greene
Proctors for Claimant and Respondents.

ANSWERS TO INTERROGATORIES PROPOUNDED BY LIBELANTS.

1. Yes.
2. George McKinnon.
3. From San Francisco to Central American Ports.
4. About 10 to 12 miles southwesterly of Point Buchon.
5. South 79° East magnetic.
6. Between 9 and 10 knots.
7. 9:53 A. M.
8. The engines were reversed from full ahead to full astern.
9. The helm was put hard astarboard.
10. J. H. McKeown was the watch officer on watch.
11. Clear and fair.
12. No.
13. About 9:45 A. M.
14. Three or four points on the "Newport's" starboard bow.
15. Yes.
16. No answer.
17. Yes.
18. None. None was requested nor apparently needed.
19. Yes, so far as required by law.
20. As long as practicable.
21. Various positions.
22. No.
23. One by the "Newport."
24. None by the "Newport."

Farnham P. Griffiths
McCutchen, Olney, Mannon & Greene
Proctors for Claimant and Respondents.

Verified.

INTERROGATORIES PROPOUNDED TO LIBELANTS, TO BE ANSWERED ON OATH.

1. What is the length, beam, depth, gross tonnage, net registered tonnage of the Steamship "Svea?"

2. At what time on the morning of November 29, 1923, was the Steamer "Newport" first sighted by those in charge of the navigation of the "Svea?"

3. With reference to the bow of said "Svea" how did said "Newport" bear at the time said "Newport" was first sighted?

4. How far away from said "Svea" was said "Newport" when the "Newport" was first sighted?

5. What whistle signals were blown on the "Svea" from the time said "Newport" was first sighted until the time of collision, and at what time was each blown and how far apart were the vessels at each of such times?

6. What changes of course or helm were made by said Steamship "Svea" from the time said "Newport" was first sighted until the said collision, and at what time was each executed, and how far apart were the vessels at each of such times?

7. What changes in speed or direction of the engines of said Steamship "Svea" from the time said "Newport" was first sighted until the time of said collision, and at what time was each such change made and how far apart were the said vessels at each of such times?

8. At the time of said collision was said "Svea" light or heavy loaded, or, if partially loaded, to what extent?

9. Immediately before said collision what was the draft of said "Svea" forward and aft?

10. Loaded as she was at the time of said collision, and proceeding at a speed of 7-½ knots through the

water, how long would it take said Steamer "Svea" to come to a stop in smooth water, and how far would she travel after putting her engines at full speed astern?

11. Going at a speed of 7-½ knots per hour through the water, what would be the radius of the circle described by the Steamer "Svea" on putting her helm hard astarboard and leaving it there until she completed the circle?

12. What result would be attained under the question put in Interrogatory No. 11 should the helm be put hard aport, under the same conditions?

13. Were there any changes in the bearing of the said "Newport" from the "Svea" from the time she was sighted until the time of collision?

14. If you answer the preceding interrogatory in the affirmative, state what changes occurred and when and how far apart the vessels were when each change was discovered by those in charge of said "Svea."

15. Were any signals from the "Newport" heard on board the "Svea" before the collision? If so, what signals were heard, at what time was each heard and how far apart were the vessels at such time?

Farnham P. Griffiths
McCutchen, Olney, Mannon & Greene
Proctors for Claimant and Respondents.

[Endorsed]: No. 1202 Civil. In the Southern Division of the United States District Court for the Southern District of California. In Admiralty. Henry Wilson, F. A. Wilson, et al., Libelants, vs. Steamship "New port" her engines, etc., et al., Respondents. Pacific Mail Steamship Company, a corporation, Claimant. Answer of Claimant and Respondents to Amended Libel. Service

of the within Answer, Answer to Interrogatories, and interrogatories and receipt of a copy is hereby admitted this 18 day of Oct. 1923. Andros & Hengstler. Filed Oct. 20, 1923. Chas. N. Williams, Clerk, By L. J. Cordes, deputy clerk. McCutchen, Olney, Mannon & Greene, Balfour Building, San Francisco, California.

[Title of Court and Cause.]

ANSWER TO CROSS-LIBEL.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES DISTRICT COURT, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SITTING IN ADMIRALTY:

Now come the libelants and cross-respondents herein, and for answer to the cross-libel of claimant, respondent and cross-libelant herein, admit, deny and allege as follows:

I.

Answering unto the allegations of Article I of said cross-libel, libelants and cross-respondents admit the same.

II.

Answering unto the allegations of Article II of said cross-libel, libelants and cross-respondents admit the same.

III.

Answering unto the allegations of Article III of said cross-libel, libelants and cross-respondents admit that at 9:53 A. M. on the 29th day of November, 1922, the steamers "Newport" and "Svea" were in collision off the coast of California at a point about 12 miles westerly

from Pt. Buchon; admit that at the time of, and during the hour immediately prior to said collision, the weather was fair and clear; deny, for want of information or belief, that until less than a minute immediately preceding the collision, or at any of the time or times, prior to the said collision herein mentioned, or at all, said "Newport" was proceeding on course S. 79 E. (Magnetic); have neither information nor belief respecting the allegation that until less than a minute immediately preceding the collision said "Newport" was proceeding at a speed of between 9 and 10 knots per hour, and therefore deny that until less than a minute immediately preceding the collision, or at any of the time or times prior to the said collision herein mentioned, or at all, said "Newport" was proceeding at a speed between 9 and 10 knots per hour; in this last mentioned behalf, allege that said "Newport," at the time of, and for a considerable period of time prior to the said collision, was proceeding at a high rate of speed; admit that during said time, said steamer "Svea" was proceeding on course N. W. by N. ½ N. (Magnetic); admit that said steamer "Newport" was in fault in respect to said collision in that she violated Articles 19, 22 and 23; in this last mentioned behalf, allege that the said steamer "Newport" was at fault in other and further particulars, as will be more particularly set out hereinafter; deny that said collision was at least, or otherwise, not due solely to said faults on the part of said steamer "Newport," unless other and further faults committed by her, and not herein particularly set forth, contributed thereto; deny that said collision was proximately or otherwise caused or contributed to by fault or faults on the part of the

steamer "Svea" and/or those in charge of her navigation, in the particulars as alleged in said cross-libel, or any of them, or at all, and in this connection deny that said steamer "Svea" did not have on watch proper and/or competent officers attending to their, or any of their duties; deny that said steamer "Svea" failed to have a competent lookout properly stationed; admit that said steamer "Svea" did not reverse her engines until the instant of the collision; in this last mentioned behalf, allege that said steamer "Svea" failed in no duty, and on the contrary, did her duty, by not reversing her engines prior to the said collision; allege further, that had the steamer "Svea" reversed her engines prior to the said collision, the same would not have been avoided thereby, and the said steamer "Svea" would have opened herself to a charge of fault; admit that the said steamer "Svea" failed to alter her course until the instant of collision, and in this last mentioned behalf, allege that the said steamer "Svea" altered her course an instant prior to the collision, but that said alteration was made in extremis, and for the purpose of easing the blow from the on-coming "Newport," and that at said time said collision was unavoidable; allege further, in the same regard, that said steamer "Svea" failed in no duty, and on the contrary, did her duty, by not altering her course prior thereto, that if she had done otherwise, the said collision would not have been avoided, and she would have opened herself to a charge of fault; deny that said steamer "Svea" violated Article 28, or any other article, of the International Rules for Preventing Collisions at all, or in that she did not blow the signals required by said article; deny that said steamer "Svea"

blew signals in violation of said Article; admit that steamer "Newport" disregarded signals of the steamer "Svea"; deny that steamer "Newport" gave no indication of heeding the signals of the steamer "Svea," but admit that the actions of the "Newport" were such as to raise a doubt as to whether she intended to obey the rule of the road; admit that the steamer "Svea" did not stop or slacken speed prior to the collision; deny that the said steamer "Svea" failed to take any precaution to avoid the impending collision; and in this last behalf, allege that the said steamer "Svea," complied with the Rules for Preventing Collisions in every respect; deny that said steamer "Svea" violated Article 27, or any other article, of the International Rules for Preventing Collisions, in that she maintained her course and/or speed after receiving clear indication from the "Newport" that she, the "Newport," intended to do nothing, and/or after a time when the "Newport" could no longer avoid the collision by her own action and/or during a time in which the steamer "Svea" could have avoided the collision by a proper use of her helm and/or engines, or at all; deny that said steamer "Svea," prior to the said collision, received clear or other indications from the "Newport," or at all, that the said "Newport" intended to do nothing; deny that after the time when the steamer "Newport" could no longer avoid the collision by her own action, the said steamer "Svea" could have avoided the collision by her own action, or by the proper or other use of her helm and/or engines, or at all; allege that after the time when the said steamer "Newport" could no longer avoid the collision by her own action, the situation of the steamer "Svea" was one

in extremis; deny that said steamship "Svea" and/or those in charge of her navigation, or any of them, were negligent in any particular or particulars any of the time or times herein mentioned; and allege, to the contrary, that said steamship "Svea" was at all of the times in said cross-libel mentioned, managed and navigated in a skillful and seamanlike manner.

IV.

Answering unto the allegations of Article IV of the said cross-libel, libelants and cross-respondents have neither information nor belief respecting the allegations as to the construction of the steamer "Newport," her burden, the number of passengers, number and specification of her crew, the damage to her bow in said collision and the obvious condition and the concern of the master for the safety of his charges, and therefore require proof thereof, if material; admit that the steamer "Svea" was a wooden vessel, proceeding light at the time of said collision, with little or no cargo, and no passengers; deny that the said steamer had a small crew, and in this behalf, allege that she had a complete crew as required by law; deny that the damage sustained by the said steamer "Svea" by reason of said collision was apparently not serious; deny that the said steamer "Svea" was apparently not in need of such immediate assistance as was the "Newport" under the circumstances; deny that such was the judgment of those in charge of said steamer "Svea."

Deny that said steamer "Svea," her master and/or those in charge of her, or any of them, failed and/or neglected to stay by said steamship "Newport," at all, or until the master or other person had ascertained

that said steamship "Newport" had no need of assistance, or of further assistance, a nd/or failed and/or neglected to stay by said steamship "Newport," and/or failed and/or neglected to render any assistance to said steamship "Newport;" and in the same behalf, allege that said steamship "Newport" drew away from the said steamship "Svea" immediately following the collision, that the latter immediately followed the said "Newport" at full speed, but could not catch up with her owing to the great speed of the "Newport," and in this connection further allege that the "Svea" made whistle and flag signals of distress all of which were disregarded by the "Newport;" deny that said steamer "Svea," her master and/or those in charge of her, or any of them, failed and/or neglected to give, but admit that they did not give, to the master or any other person in charge of said steamship "Newport," or to any one person on board said vessel, the name of the said steamship "Svea," her port of registration or the port or place to which she benonged, or the name of the port from which and to which she was bound, or any of them; in the same behalf allege that none of the last-named parties requested or manifested any interest in the last aforementioned particulars as to the steamship "Svea," and that no opportunity was afforded for the giving of the said information, by reason of the immedia'e departure of the said "Newport."

V.

Answering unto the allegations of Article V of the said cross-libel, libelants and cross-respondents have neither information nor belief as to the nature or the amount of the damage, sustained by said steamship

"Newport" by reason of said collision, and therefore deny that cross-libelant has been damaged in the sum of approximately Fifty-Five Thousand Dollars ($55,000.00), or in any other sum, and call for strict proof thereof, if material; admit that no part of said alleged damage has been paid to cross-libelant by cross-respondents.

VI.

Answering unto the allegations of Article VI of the said cross-libel, libelants and cross-respondents admit that the premises are within the admiralty and maritime jurisdiction of the United States and of this Honorable Court, but deny that the premises, all and/or singular, except as herein admitted, are true.

* * * * * * * * * * *

AND FOR FURTHER AND FIRST AFFIRMATIVE DEFENSE LIBELANTS AND CROSS-RESPONDENTS ALLEGE:

I.

That heretofore, to-wit: on the 29th day of November, 1922, at about 9:53 A. M. on said day, while the steamship "Svea," owned by libelants and cross-respondents, was bound on a voyage from the port of Ventura, in the State of California, to the port of Aberdeen, in the State of Washington, and while off the coast of California, at a point about twelve (12) miles westerly from Point Buchon, said vessel was run into by the steamship "Newport," owned by said respondents and cross-libelants; that as a result of said collision said steamship "Svea" was so badly damaged that she filled with water and capsized before she could make port; and was an almost total loss.

II.

That said steamship ' 'Svea" was, at the time of said collision, and at all times prior thereto during said voyage, and at the commencement of said voyage, in all respects seaworthy, and properly and efficiently officered, manned, supplied, equipped and furnished, and well and sufficiently fitted and supplied with suitable engines, boilers, machinery, tackle, apparel, appliances and furniture, all in good order and condition, and suitable for the business and voyage in which she was engaged; that the owners of said steamship had at all of said times exercised due diligence to make said vessel in all respects seaworthy, and properly and efficiently officered, manned, equipped, supplied and furnished, and well and sufficiently fitted and supplied with suitable engines, boilers, tackle, apparel, appliances and furniture.

III.

That at the time of said collision the weather was fair and clear; that said steamship "Svea" was at said time, and had been for about thirty-eight (38) minutes prior thereto, proceeding on a course Northwest by North one half North magnetic, at a speed of about seven and one-half (7½) knots per hour; that said steamship "Newport" was proceeding on an East Southeasterly course, at a high rate of speed, and was at all of said times on the port bow of the "Svea," and at all of said times the "Svea" was on the starboard side of the "Newport"; that at all of said times said steamship "Svea" held her course and speed, and complied with all rules of navigation, and was at all of said times navigated with due caution and skill by the master and officers thereof; that said collision was not caused

by any fault, negligence or want of due care on the part of libelants and cross-respondents, or the master, or the officers, or crew of said steamship "Svea", or any of them.

* * * * * * * * * * *

AND FOR A FURTHER AND SECOND AFFIRMATIVE DEFENSE, LIBELANTS AND CROSS-RESPONDENTS ALLEGE:

I.

Libelants and cross-respondents hereby refer to paragraphs I to III inclusive of the first affirmative defense and by such reference incorporate the allegations of said paragraphs herein with the same force and effect as though they and each thereof were set out at length herein.

II.

Libelants and cross-respondents allege that said collision and the consequent damages to said steamship "Svea", and to her owners, master, officers and crew, were entirely due to the fault of the cross-libelants and respondents, and particularly those in charge of the navigation of said steamship "Newport", and that said vessel was at fault in the following, among other particulars:

FIRST: Upon information and belief, that said vessel did not have a proper or competent officer on watch at the time of said collision, and immediately prior thereto.

SECOND: Upon information and belief, that said vessel did not have a proper or competent helmsman at the steering wheel of said vessel at the time of said collision, or immediately prior thereto.

THIRD: Upon information and belief, that said steamship "Newport" at, and immediately prior, to the time of said collision, did not have a proper and competent lookout on watch.

FOURTH: That said steamship "Newport" at, and immediately prior, to the time of said collision, was violating Article 19 of the International Rules for Preventing Collisions, in that said vessel having the steamship "Svea" on the starboard side of said steamship "Newport" did fail to keep out of the way of said steamship "Svea".

FIFTH: That said steamship "Newport" at, and immediately prior, to the time of said collision was violating Article 22 of said International Rules for Preventing Collisions, in that it failed to pass astern of said steamship "Svea".

SIXTH: That said steamship "Newport" at, and immediately prior, to the time of said collision was violating Article 23 of said International Rules for Preventing Collisions, in that while approaching said steamship "Svea", and while it was obliged by the said International Rules to keep out of the way of said steamship "Svea", it failed to slacken its speed, and did fail to stop, and did fail to reverse its engines.

SEVENTH: That said steamship "Newport" was negligent in other and further particulars, of which the libelants and cross-respondents are not at present advised, but when so advised will beg leave to offer proof of said negligent acts, and to amend their answer to conform with such facts.

* * * * * * * * * *

nothing by its cross-libel, and that the same may be dismissed with costs, and that libelants and cross-respondents may have such other relief as may be deemed meet in the premises.

Andros & Hengstler
Proctors for Libelants and
Cross-Respondents.

Verified.

[Title of Court and Cause.]

ANSWER TO INTERROGATORY NO. 1: Length 174 feet; beam 38.2 feet; depth 13.3 feet; gross tonnage 618; net registered tonnage 370.

ANSWER TO INTERROGATORY NO. 2: About 9:20 A. M.

ANSWER TO INTERROGATORY NO. 3: On the port bow of the "Svea".

ANSWER TO INTERROGATORY NO. 4: Nothing less than 8 miles.

ANSWER TO INTERROGATORY NO. 5: One blast by "Svea"—vessels about 2 miles apart—a few minutes before collision—exact time unknown. Four blasts—about one and one-half or two minutes after first signal—vessels more than 1 mile apart—exact time unknown. Four short blasts—vessels about 3/8 mile apart—time unknown.

ANSWER TO INTERROGATORY NO. 6: No changes of course or helm until vessels were about 100 feet apart, when helm was ported to ease the blow of the "Newport".

ANSWER TO INTERROGATORY NO. 7: No change in engines until instant of collision when they were stopped.

ANSWER TO INTERROGATORY NO. 8: Light.

ANSWER TO INTERROGATORY NO. 9: Draft 14 feet aft, 7 feet 6 inches forward.

ANSWER TO INTERROGATORY NO. 10: Don't know—never tried it.

ANSWER TO INTERROGATORY NO. 11: Don't know—never measured it.

ANSWER TO INTERROGATORY NO. 12: Don't know—never measured it.

ANSWER TO INTERROGATORY NO. 13: Possibly some slight changes in bearing—the "Newport" was at all times on the port bow of the "Svea".

ANSWER TO INTERROGATORY NO. 14: Cannot state—see answer to No. 13.

ANSWER TO INTERROGATORY NO. 15: None.

F. A. Wilson

Libelant and cross-respondent in his own behalf, and in behalf of the others of said libelants and cross-respondents.

Subscribed and sworn to before me, this 22nd day of November, 1923.

E. M. Clark

Notary Public in and for the City and County of San Francisco, State of California.

[Seal]

[Endorsed]: No. 1202 Civil. District Court of the United States for the Southern District of California, in Admiralty. Henry Wilson, et al., libelants, vs. Steamship "Newport," etc., et al., respondents, Pacific Mail Steamship Company, a corporation, claimant. Pa-

cific Mail Steamship Company, a corporation, Claimant, Respondent and Cross-Libelant, vs. Henry Wilson, et al., Libelants and Cross-Respondents. Answer to Cross-Libel and Answers to Interrogatories Propounded in Answer and Cross-Libel. Due service and receipt of a copy of the within Answer & Answers to Interrogatories is hereby admitted this 22nd day of Nov. 1923. Farnham P. Griffiths, McCutchen, Olney, Mannon & Greene. Filed Nov. 26, 1923. Chas. N. Williams, Clerk by L. J. Cordes, deputy clerk. Andros & Hengstler Proctors for Libelants and Cross-Respondents. Kohl Building, San Francisco, California.

At a stated term, to wit: The January Term, A. D. 1924 of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Tuesday the sixth day of May, in the year of Our Lord one thousand nine hundred and twenty-four.

Present:

The Honorable PAUL J. McCORMICK, District Judge.

Henry Wilson, et al.
Libellants,
vs.
The Steamer "Newport", etc.,
Respondent.
} No. 1202 Civil.

This cause coming before the court at this time for hearing; L. K. Vermille, Esq., and Frederick W. Dorr, Esq., appearing as proctor for the libellants and H. R. Kelly, Esq., and Russell A. Mackey, Esq., appearing as proctor for the respondent; and

The following depositions having been offered and admitted in evidence:

.....Ex. No. : Deposition of Karl Rohberg,
" " No. : Deposition of Charles S. Semsen,
" " No. : Deposition of John McCowan,

James Hayes is called and sworn and testifies in behalf of the libellant, and in connection with his testimony there having been offered and admitted in evidence on behalf of the libellants the following exhibits, to wit:

Libellants' Ex. 2—1 photograph,
" Ex. 3—1 photograph,
" Ex. 4—1 photograph,
" Ex. 5—1 photograph,
" Ex. 6—1 photograph,

Said James Hayes is cross examined by Russell A. Mackey, Esq. counsel for the respondent; and

Thereupon there is offered and admitted in evidence on behalf of the respondent the following exhibit, to wit:

Respondent's Ex. A—diagrams of signal of bells; and

The Libellants and cross respondents having thereupon rested,

Attorney Russell A. Mackey, Esq. makes a statement to the court; and

George McKinnon having thereupon been called and sworn and having testified in behalf of the respondent;

There is offered and admitted and marked in evidence on behalf of the respondents the following exhibit, to wit:

Respondent's Ex. B—diagram;

and

Said witness having been cross examined by Attorney Frederick W. Dorr, Esq. of counsel for the libellants; and

C. A. Haggendorff having been called and sworn and having testified in behalf of the respondent,

It is by the court ordered that this cause be continued to the hour of two o'clock P. M. and at the hour of two o'clock P. M. the court having reconvened and all being present as before

Fred Warner is called and sworn and testifies in behalf of the Respondent, and Albert E. Winslow and John O. Blanchfield having been called and sworn and having testified in behalf of the respondent,

The respondent rests, and

The Libellant having rested,

Attorney Frederick W. Dorr, Esq. argues to the court on behalf of the libellant, and

Russell A. Mackey, Esq. having argued to the court on behalf of the respondent, and

Said Frederick W. Dorr, Esq. having argued in rebuttal for the libellant,

This cause is taken under submission by the court.

At a stated term, to wit: The July A. D. 1924 Term, of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, on Wednesday the 10th day of September, in the year of Our Lord one thousand nine hundred and twenty-four;

Present:

The Honorable PAUL J. MC CORMICK, District Judge.

Henry F. Wilson, et al.,
Plaintiffs.
vs.
Steamship "Newport,"
Defendant.
} No. 1202 Civil.

A decree is ordered for the libellants and cross respondent and against the cross libellants, respondents and claimants, pursuant to and in accordance with written memorandum opinion filed this day; and it is further ordered that proctors for the libellants and cross respondents prepare same and present upon adverse parties and present the same to the court as appropriate decree.

[Title of Court and Cause.]

INTERLOCUTORY DECREE AND ORDER REFERRING CAUSE TO COMMISSIONER.

The above entitled cause having come on regularly for hearing in open court on the 6th day of May, 1924, libelants and cross-respondents being represented by Messrs. Andros & Hengstler and Frederick W. Dorr, Esq., and cross-libelants, respondents and claimant being represented by Messrs. McCutchen, Olney, Mannon & Greene, and Russell A. Mackey, Esq., and all the evidence having been submitted to the court, and the court having considered the evidence, and the oral arguments of counsel, and the authorities submitted by counsel, and having on the 10th day of September, 1924, filed its memorandum opinion deciding that the collision between the steamship "Newport" and the steamship "Svea" on the 29th day of November, 1922, was due to the gross negligence and plain fault of said steamship "Newport", and that said steamship "Newport" was

solely at fault for said collision, and liable for all damages caused thereby, and that the steamship "Svea" was not in fault for said collision;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the libelants Henry Wilson, F. A. Wilson, W. T. Wilson, Lucy W. Kendall, A. Kendall, A. J. Patterson, Jas. Pennycock, O. Bertelsen, J. S. Hutchinson, E. C. Hutchinson, C. E. Allen, A. B. Johnson, Katie M. Johnson, Mariett Johnson, A. Hansen, Clara A. Buchholz, H. W. Jackson, L. Everding, Frank Graham, Margaret A. Wilson, Trustee, Carrie E. Wilson, J. H. Wilson, Margaret A. Wilson, Wm. C. Wilson, James Graham, B. P. Nelson, Karl Rohberg, Charles S. Semsen, James Hayes, C. H. Anderson, Harry Walton, W. Saaris, Gust Anderson, Gust Saarinen, Wm. R. Reilly, Louis Norloff, John McDonald, Wilson Bangay, Robert White, George Dolan, John Lewis and Sett Strand shall have and recover from steamship "Newport", her engines, boilers, tackle, etc., George McKinnon, master of said vessel, and Pacific Mail Steamship Company, a corporation, respondents, and from Pacific Mail Steamship Company, a corporation, claimant, for all loss and damage suffered by said libelants or any of them by reason of said collision;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Pacific Mail Steamship Company, a corporation, cross-libelant herein, shall take nothing by its cross-libel and that the same be, and is hereby, dismissed;

IT IS FURTHER ORDERED that this cause be, and the same is hereby referred to Francis Krull, Esq., United States Commissioner for the Northern District of California, at San Francisco, California, to take testi-

mony and ascertain the amounts due the libelants and to report the same to this court with all convenient speed.

Dated: Los Angeles, California, September 15th, 1924.

Paul J. McCormick
United States District Judge

Decree entered and recorded 9/15/24. Chas. N. Williams, clerk, by Louis J. Somers, deputy clerk.

[Endorsed]: No. 1202 Civil. In the Southern Division of the United States District Court in and for the Southern District of California. In Admiralty. Henry Wilson, et al., libelants, vs. Steamship "Newport," etc., et al., respondents. Pacific Mail Steamship Company, a corporation, Claimant. Pacific Mail Steamship Company, a corporation, Cross-Libelant, vs. Henry Wilson, et al., Cross-Respondents. Interlocutory Decree and Order Referring Cause to Commissioner. Due service and receipt of a copy of the within "interlocutory decree and order referring cause to commissioner" is hereby admitted this 12th day of September, 1924. Farnham P. Griffiths. McCutchen, Olney, Mannon & Greene Proctors for Respondents, Claimant and Cross-Libelant. Filed Sep. 15, 1924, Chas. N. Williams, Clerk. By Louis J. Somers, deputy clerk. Andros and Hengstler, Proctors for Libelants. Kohl Bldg. San Francisco, Cal.

[Title of Court and Cause.]

FINAL DECREE

This cause having come on regularly for hearing in open court on the 6th day of May, 1924, libelants and

cross-respondents being represented by Messrs. Andros & Hengstler and Frederick W. Dorr, Esq., and cross-libelant, respondents and claimant being represented by Messrs. McCutchen, Olney, Mannon & Greene, and Russell A. Mackey, Esq., and the Court having considered the evidence, and the oral arguments of counsel, and the authorities submitted by counsel, and having filed its memorandum opinion finding and holding that the collision between the steamship "Newport" and the steamship "Svea", which occurred on the 29th day of November, 1922, was due to the gross negligence and plain fault of said steamship "Newport", and that said steamship "Newport" was solely at fault for said collision, and liable for all damages caused thereby, and that the steamship "Svea' was not at fault for said collision;

And thereafter an interlocutory decree having been made and entered herein, whereby and wherein it was ordered, adjudged and decreed that the libelants should have and recover from the steamship "Newport", her engines, boilers, tackle, etc., George McKinnon, master of said vessel, and Pacific Mail Steamship Company, a corporation, respondents, and from Pacific Mail Steamship Company, a corporation, claimant, for all loss and damage suffered by said libelants or any of them by reason of said collision; and that Pacific Mail Steamship Company, a corporation, cross-libelant herein, should take nothing by its cross-libel, and that the same be dismissed; and that this cause be referred to Francis Krull, Esq., United States Commissioner for the Northern District of California, at San Francisco, California, to take testimony and ascertain the amounts due the

libelants and to report the same to this Court with all convenient speed;

And thereafter, in pursuance of said interlocutory decree, the report of said commissioner having been presented and filed herein, whereby and wherein said commissioner did find and report that there was due to the libelants from the respondents, as follows:

To the owners of the steamer "Svea" for and on account of the damages sustained by reason of the collision herein the sum of $75,154.53; and the costs incurred in defending the salvage action entitled Andrew F. Mahoney, Thomas Crowley, et al., vs. Henry Wilson, et al., No. 18489 in the United States District Court for the Northern District of California, Southern Division, as said costs may be taxed; together with interest at the rate of seven per cent. per annum from November 29, 1922, the date of the collision; and

To Karl Rohberg, libelant, for loss of personal effects and clothing the sum of $250.00

To James Hayes, libelant, for loss of personal effects and clothing the sum of 360.00

To Charles S. Semsen, libelant, for loss of personal effects and clothing the sum of 80.00

To William B. Reilly, libelant, for loss of personal effects and clothing the sum of 250.00

To Harry Walton, libelant, for loss of personal effects and clothing the sum of 50.00

To C. H. Anderson, libelant, for loss of personal effects and clothing the sum of 250.00

And thereafter exceptions having been filed to the report of said commissioner by the libelants and by the respondents and claimant, and said exceptions having

come on for hearing, and having been argued by counsel and submitted to this Court for decision, and thereafter, on the 19th day of February, 1926, this Court having made and entered its order overruling the said exceptions to said report and ordering that said report be confirmed;

NOW, THEREFORE, on motion of Andros, Hengstler & Dorr, proctors for libelants,

IT IS ORDERED, ADJUDGED AND DECREED that the libelants Henry Wilson, F. A. Wilson, W. T. Wilson, Lucy W. Kendall, A. Kendall, A. J. Patterson, Jas. Pennycock, O. Bertelsen, J. S. Hutchinson, E. C. Hutchinson, C. E. Allen, A. B. Johnson, Katie M. Johnson, Mariett Johnson, A. Hansen, Clara A. Buchholz, H. W. Jackson, L. Everding, Frank Graham, Margaret A. Wilson, Trustee, Carrie E. Wilson, J. H. Wilson, Margaret A. Wilson, Wm. C. Wilson, James Graham and B. P. Nelson do have and recover from the steamship "Newport", her engines, boilers, tackle, etc., George McKinnon, master of said vessel, respondents, and Pacific Mail Steamship Company, a corporation, respondent and claimant, the sum of $75,154.53, together with interest thereon at the rate of seven per cent. per annum from the 29th day of November, 1922, apportioned according to their respective shares in the steamship "Svea", as follows:

	Share:	Amount:	Interest:	Total:
To Henry Wilson	16/64	$18,788.62	$4,310.88	$23,099.50
To F. A. Wilson	3/64	3,522.87	808.29	4,331.16
To W. T. Wilson	2/64	2,348.58	538.86	2,887.44
To Lucy W. Kendall	1/64	1,174.29	269.43	1,443.72

To A. Kendall	2/64	2,348.58	538.86	2,887.44
To A. J. Patterson	1/64	1,174.29	269.43	1,443.72
To Jas. Pennycock	1/64	$ 1,174.29	$ 269.43	$ 1,443.72
To O. Bertelson	2/64	2,348.58	538.86	2,887.44
To J. S. Hutchinson	2/64	2,348.58	538.86	2,887.44
To E. C. Hutchinson	2/64	2,348.58	538.86	2,887.44
To C. E. Allen	2/64	2,348.58	538.86	2,887.44
To A. B. Johnson	2/64	2,348.58	538.86	2,887.44
To Katie M. Johnson	1/64	1,174.29	269.43	1,443.72
To Mariett Johnson	1/64	1,174.29	269.43	1,443.72
To A. Hansen	3/64	3,522.87	808.29	4,331.16
To Clara A. Buchholz	2/64	2,348.58	538.86	2,887.44
To H. W. Jackson	2/64	2,348.58	538.86	2,887.44
To L. Everding	1/64	1,174.29	269.43	1,443.72
To Frank Graham	1/64	1,174.29	269.43	1,443.72
To Margaret A. Wilson, Trustee,	4/64	4,697.16	1,077.72	5,774.88
To Carrie E. Wilson	1/64	1,174.29	269.43	1,443.72
To J. H. Wilson	1/64	1,174.29	269.43	1,443.72
To Margaret A. Wilson	4/64	4,697.16	1,077.72	5,774.88
To Wm. C. Wilson	2/64	2,348.58	538.86	2,887.44
To James Graham	1/64	1,174.29	269.43	1,443.72
To B. P. Nelson	4/64	4,697.15	1,077.72	5,774.87
Total		$75,154.53	$17,243.52	$92,398.05

and said libelants do also have and recover the costs incurred in defending the salvage action entitled Andrew F. Mahoney, Thomas Crowley, et al., vs. Henry Wilson, et al., No. 18489 in the United States District Court for the Northern District of California, Southern Division, as said costs may be taxed; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the following named libelants do have and recover from the steamship "Newport", her engines, boilers, tackle, etc., George McKinnon, master of said vessel, respondents, and Pacific Mail Steamship Company, a corporation, respondent and claimant, as follows:

Karl Rohberg—the sum of	$250.00
with interest at seven per cent. per annum from November 29, 1922	57.33
Total	$307.33
James Hayes—the sum of	$360.00
with interest at seven per cent. per annum from November 29, 1922	82,60
Total	$442.60
Charles S. Semsen—the sum of	$ 80.00
with interest at seven per cent. per annum from November 29, 1922	18.33
Total	$ 98.33
William B. Reilly—the sum of	$250.00
with interest at seven per cent. per annum from	

November 29, 1922	57.33
Total	$307.33
Harry Walton—the sum of	$ 50.00
with interest at seven per cent. per annum from November 29, 1922	11.43
Total	$ 61.43
C. H. Anderson—the sum of	$250.00
with interest at seven per cent. per annum from November 29, 1922	57.33
Total	$307.33

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the libelants Henry Wilson, F. A. Wilson, W. T. Wilson, Lucy W. Kendall, A. Kendall, A. J. Patterson, Jas. Pennycock, O. Bertelsen, J. S. Hutchinson, E. C. Hutchinson, C. E. Allen, A. B. Johnson, Katie M. Johnson, Mariett Johnson, A. Hansen, Clara A. Buchholz, H. W. Jackson, L. Everding, Frank Graham, Margaret A. Wilson, Trustee, Carrie E. Wilson, J. H. Wilson, Margaret A. Wilson, Wm. C. Wilson, James Graham, B. P. Nelson, Karl Rohberg, Charles S. Semsen, James Hayes, C. H. Anderson, Harry Walton, W. Saaris, Gust Anderson, Gust Saarinen, Wm. R. Reilly, Louis Norloff, John McDonald, Wilson Bangay, Robert White, George Dolan, John Lewis and Sett Strand do have and recover from the steamship "Newport," her engines, boilers, tackle, etc., George McKinnon, master of said vessel, respondents, and Pacific Mail Steamship Company, a corporation, respondent and

claimant, the costs of said libelants incurred herein, to be taxed at $807.04; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, if this decree shall remain unsatisfied for ten days after the entry thereof and notice to the proctors for the respondents and claimant, the stipulators for costs and value on the part of the claimant of said steamship "Newport", her engines, boilers, tackle, etc., shall cause the engagements of their stipulations to be performed, or show cause within four days why execution should not issue against them, their lands, goods and chattels for the amounts, together with interest thereon set forth in this decree.

Dated: March 10th, 1926.

Paul J. McCormick
United States District Judge.

APPROVED AS TO FORM, AS PROVIDED IN RULE 44 Farnham P. Griffiths, McCutchen, Olney, Mannon & Greene, Proctors for Respondents and Claimant.

Decree entered and recorded March 10, 1926. Chas. N. Williams, clerk, By Louis J. Somers, deputy.

[Endorsed]: No. 1202 Civil. District Court of the United States, for the Southern District of California, Third Division, In Admiralty. Henry Wilson, et al., libelants, vs. Steamship "Newport," etc., respondents. Pacific Mail Steamship Company, a corp., claimant. Final Decree. Filed Mar. 10th, 1926. Chas. N. Williams, Clerk, by Louis J. Somers, deputy. Andros, Hengstler & Dorr, Proctors for Libelants, Kohl Building, San Francisco, Cal.

[Title of Court and Cause.]

MEMORANDUM OPINION

Suits in Admiralty by cross libels arising out of a collision which occurred in the open and uninterrupted sea of the Pacific Ocean at a point twelve miles westerly from Point Buchon, between the Steamship "Newport" and the Steamship "Svea" in which the "Newport" collided with and ran into the "Svea" at about midships, causing the "Svea" to completely overturn.

The collision happened at about 9:53 o'clock on the morning of November 29, 1922. The weather was clear and serene. The sea was placid and visibility was perfect for at least ten miles.

The "Newport" is an iron steamship of about 2643 gross tons burden, engaged in passenger traffic between San Francisco, California and Central American ports. At the time of the collision she was bound for Central America and was and had been for about thirty minutes prior to the contact sailing at about ten knots per hour on a course south 79 east (magnetic).

The "Svea" is a wooden steam schooner of about 618 gross tons, engaged in the lumber carrying trade between Gray's Harbor, Washington, and southern California ports. At the moment before collision, and for one half hour previous she was bound for San Francisco on a course N. W. by N. ½ N. (magnetic) at a speed of about seven and one-half knots per hour. She was bearing about three points on the starboard bow of the "Newport".

It is conceded by all parties that the courses of the two steamers at and prior to the collision were such

that the "Svea" was the privileged vessel and the "Newport" the burdened ship. Such being the admitted case, under the rules it was the prime duty of the "Newport" to keep out of the "Svea's" way. The "Newport" frankly admits negligence and liability but invokes and seeks to have this Court apply the half damage rule because it claims that the "Svea" was guilty of contributory negligence in adhering to the rule too stringently.

The issue for decision, therefore, is whether the Steamer "Svea" was justified in proceeding with her course and speed until the collision.

The general rule which is applicable here is announced in the "Delaware" 161 U. S. 459:

> "That the preferred steamer will not be held at fault for maintaining her course and speed so long as it is possible for the other to avoid her by porting, or until she has some distinct indication that the other vessel is about to fail in her duty."

From a careful and extended consideration of the evidence in this suit, I am of the opinion that in this instance the "Svea" should not be held liable for strict compliance with the rule aforesaid. It is argued by Proctors for the "Newport" that because both vessels from about 9:20 A. M. until the collision and over a distance of approximately eight miles were clearly visible to each other, and inasmuch as the bearing of the "Newport" did not change or deviate, such facts in themselves were definite proof that the vessels would inevitably come into collision unless one or the other modified her course or speed, but under the evidence I am unable to say at what point, if ever, it became clear to the "Svea" that the "Newport" would not yield

the right of way or would fail in her bounden duty to pass astern of the "Svea". If the navigator of the "Svea" had breached the rule and the collision had still occurred it would be very difficult for the "Svea" to absolve herself under the law. The "Newport" was being navigated in a grossly negligent manner, in fact, it reasonably appears that there was no one at the helm or upon the bridge or in the pilot house of the "Newport" or, in fact, a competent or any lookout on watch thereon until an instant before the collision when the Master of the "Newport" arrived on the bridge thereof. But I do not believe that the mere existence of these facts themselves were a clear indication to the Master of the "Svea" that the "Newport" would fail to perform the duty which the law enjoined upon her of keeping clear of the "Svea". The "Svea" first realized that the "Newport" was not going to do anything when the ships were but two hundred feet apart, and nothing could thereafter have been done by the "Svea" which would have prevented or avoided the collision with the "Newport". I am satisfied from the evidence and from the testimony of the Master of the "Svea" that he was always uncertain as to the activities of the "Newport" and as to those in charge of her navigation, and if in such a situation he were called upon to make an assumption as to what the "Newport" would do, he would, in my judgment, be required to assume that a burdened steamship of her proportions carrying many passengers and proceeding at a speed between nine and ten knots per hour in the open sea of the Pacific Ocean was properly manned and officered, and that he would be required to continue such an assumption until he had

clear and unmistakable indication or manifestation to the contrary. It appears that when the ships were two miles apart the "Svea" blew one whistle and received no acknowledgement or response from the "Newport", and that again when one mile apart the "Svea" blew four whistles with the same result and that yet again when about two hundred feet apart four blasts were again blown by the "Svea" which were also unheeded by the "Newport". It is claimed that these facts must have conveyed to the Master of the "Svea" who was upon the bridge during the entire time that the "Newport" did not intend to comply with the rules of the road. I do not think that such deduction necessarily follows. The "Svea" was required to hold her course and speed as long as it was possible for the "Newport" to avoid her by porting, or until she had some distinct notification that the "Newport" was about to fail in its duty. The evidence of the Master of the "Svea" convinces me that he had no distinct, clear and unmistakable indication that the "Newport" would fail in her duty until he had rightfully reached a point where he was in extremis and where probably a collision was unavoidable, and I am also satisfied that he then exercised his best judgment, to strictly comply with the rule. This is all that he was required to do. If he had guessed as to the course or maneuvers of the "Newport" he might have guessed wrong and in such a situation he would probably have been accountable for deviating and departing from the rule of the road, which required him to keep his course and speed. I do not believe that he is required to or should be permitted to guess in such a situation and emergency, for if while lawfully navigating a privileged

ship and duly observing the rules of the road, a Master is placed in extremis by the gross negligence of the other ship, he will not be held accountable for a wrong decision if he exercises his best judgment in the light of things and conditions known to and seen by him at the time.

I am not convinced that if the "Svea" had stopped and reversed her engines or changed her course, when the "Newport" argues that she should have done so, the collision could have been avoided. The evidence rather indicates to my mind the contrary. It is the law clearly and uniformly established by decisions that it was incumbent upon the "Newport" where her own fault is so gross and so plainly shown as it is here, to prove affirmatively and conclusively the fault of the "Svea". "The Binghamton" 271 Federal 68. This in my opinion she has not done. As was said by the Court in the "Haida" 191 Federal 623:

> "It must always be a close question when the time comes at which the burdened vessel can by no possibility do her duty and that time is doubly hard for the privileged vessel to find for she has no right to change her course and speed until then."

Although argument may now show by subsequent events that stopping or backing or changing course on the part of the "Svea" would have avoided collision, it does not prove negligence. "The Musconetcong" 255 Federal 675.

I have adverted to the contention of the Proctors for the "Newport" that because the Master of the "Svea" looking at the bridge and pilot house of the "Newport" thru his glasses before he blew the first four blasts saw

no activity thereon or therein, he had thereby received a clear indication that the "Newport" would fail in her duty as the burdened ship, but I cannot agree with this contention. The Master of the "Svea" testified he could not definitely see into the pilot house nor could he see the telegraph. He said that altho he looked at the "Newport's" bridge and saw no one, that he did not know that there was or was not anyone there, and merely because he was unable to see anyone on the bridge of the "Newport" he was not thereby justified in assuming that there was no one there and that the ship was being navigated without pilot, officer, or lookout, and was not thereby justified in disobeying the rule which required him to maintain his course and speed until he had distinct indication that the "Newport" was about to fail in her duty.

I have concluded that this collision was due to the gross negligence and plain fault of the "Newport" as alleged in the amended libel and answer to the cross libel and that the plea of contributory negligence on the part of the "Svea", as claimed in the answer to amended libel and the cross libel, has not been sustained by a preponderance of the evidence. The half damage rule is not applicable to this case. Proctors for libelants will prepare and serve upon Proctors for respondents an appropriate decree in accordance with this Memorandum Opinion and pursuant to the stipulation entered in to in open Court at the time of trial as to the measurement and assessment of damages hereunder and will then present the same to the Court for consideration.

Paul J. McCormick
U. S. District Judge Southern
District of California

Dated this 10th day of September, 1924.

[Endorsed]: No. 1202 Civil. United States District Court, Southern District of California. Henry Wilson, F. A. Wilson, W. T. Wilson, Lucy W. Kendall, A. Kendall, A. J. Patterson, Jas. Pennycock, et al., libelants and cross respondents vs. Steamship "Newport" her engines, boilers, tackle, etc., J. McKinnon, Master of said vessel and Pacific Mail Steamship Company, a corporation, owner of said vessel, cross libelants, respondent and claimants. Memorandum Opinion. Filed Sep. 10, 1924. Chas. N. Williams, clerk, by Louis J. Somers, deputy clerk.

[Title of Court and Cause.]

LOS ANGELES, CALIF., TUESDAY, MAY 6, 1924. 10:00 A. M.

THE COURT: 1202 C., Henry Wilson, et al., versus Steamer "Newport".

MR. DORR: Ready, your Honor.

MR. MACKEY: Ready, your Honor.

THE COURT: Proceed.

MR. DORR: If the court please, this action arises out of a collision between two steamships, the Steamship "Svea", owned by a number of owners, Messrs. Wilson Brothers being the principal owners, and the Steamship "Newport", owned by the Pacific Mail Steamship Company. I appear in behalf of the owners of the "Svea", and Mr. Vermille, of the office of Overton, Lyman & Plumb, is associated with me. Mr. Mackey, of Messrs. McCutcheon, Olney, Mannon & Greene, appears on behalf of the owners of the "Newport".

The "Svea" was a steamer of the type commonly seen on this Coast, a steam schooner in the lumber trade, running from the northern ports into the ports of Southern California, and at the time of the collision in question was northbound empty, having discharged her cargo, I think, at Ventura. The Steamer "Newport", which is a somewhat larger vessel, was a passenger vessel on a regular run of the Pacific Mail Steamship Company between San Francisco and the ports of Central America, and at the time of the collision was southbound. The collision occurred off shore, about 10 or 15 miles off shore, off the coast of San Luis Obispo County, off what is known as Point Buchon. It was a clear morning, about 10 o'clock in the morning, the actual time of the collision being 9.53. It was bright, sunny and clear, and some witnesses will testify they could see 20 miles. The collision occurred on November 29, 1922. In order to make the situation clear in making my statement, I have prepared a sketch, not for the purpose of introducing it in evidence, but for the purpose of illustrating the position of the two vessels. This (indicating) represents the position of the "Svea" one-half hour before the collision. The testimony shows—there have been a number of depositions taken, that she was going at the rate of about seven and one-half miles an hour. She was holding this course in a northerly direction, a northwesterly direction, and this distance is three and three-quarter miles, which distance she would travel at that rate in one-half hour. This represents the position of the "Newport" one-half hour before the collision. According to the statements of her master she was making about nine knots, and this distance repre-

sents four and one-half miles, which distance she would travel in half an hour. The "Svea" proceeding on this course sighted the "Newport" somewhere when she was in this locality. The "Newport" at that time was about eight miles away. The "Svea" continued to hold that course and speed up until the time of the collision.

Under the rules of the road a vessel in the position of the "Svea", having the other vessel on the left side, or, as they say in nautical terms, on the port hand, has the right-of-way, is the privileged vessel, and must, under the rules, hold her course and speed. On the other hand, a vessel in the position of the "Newport", having the other vessel on her right side, or her starboard side, is the burdened vessel and must keep out of the way of the vessel which has the right-of-way, and must, if necessary, slacken her speed, stop, and reverse in order to avoid crossing ahead. The testimony will show that when the "Svea" proceeded along about the point I am now indicating, the captain and the mate, who were both on the bridge observing the "Newport" approaching down this course,—and at that time she was between two and three miles away, began to wonder what the "Newport" was going to do, and there was some remarks passed between them. They proceeded a little farther, say a half a mile, to a point where the vessels had approached to within less than two miles of each other, and the "Svea" blew one blast on her whistle, which would indicate, under the rules, that she was holding the course which she was required under the rules to hold. She heard no answer from the "Newport" and she proceeded a little farther, about three-eights of a mile, and blew four short blasts, a signal which is an alarm or

danger signal, to call the attention of the "Newport" to her signals. She proceeded a little further, a distance of about three-tenths of a mile, approximately, which running took about a minute and a half, and sounded the danger signal again, and still no answer from the "Newport", the "Newport" approaching all the time, and at that point she was about a half a mile away. After the second alarm signal the captain and the mate of the "Svea" began to consider the danger of a collision, the "Newport" not having changed her bearing, and they began to consider what they should do.

These marks on the sketch, representing the vessels, are very much larger than the scale and, of course, do not represent the actual size of the ships. This is the distance here, a half a mile between the two vessels, approximately.

At that time the captain, who had charge of the navigation, considered whether or not he was the burdened vessel or the privileged vessel and obliged under the law to hold his course and speed, or whether he should take some action by turning or stopping or backing in order to avoid the "Newport", which did not seem to be changing its course. There was still plenty of time at that time if the "Newport" would swing a slight helm to swing astern of the "Svea", which he was obliged to do, and the captain of the "Svea" was considering that if the "Newport" did not swing, which under the rules he was obliged to do, there would be a collision as a certainty, and whether or not he would be at fault, so he decided the only thing to do was for him to hold his speed, and he did hold his speed until he got up to where a collision was inevitable. He then

put his helm hard to port, which had a tendency to swing the vessel to the right or away from the "Newport". That action was taken, I say, at the time of the collision in order to avoid a direct blow, if possible. The "Newport" struck the "Svea" amidships, about half way between her bow and stern, cutting deeply into the side of the vessel, and for some distance below her water line, and then bumped along the side and drifted clear. The "Svea's" engines were not stopped until after the collision. Shortly after the collision the vessels were together for a moment or two, then the "Newport" started off to the south. There was apparently no damage to her bow. The "Svea" was smashed in and the water seemed to be running out. The "Newport" started off to the south and the "Svea" turned around and attempted to follow the "Newport". Someone on the "Newport" had sung out to the "Svea" for the "Svea" to stand by, which they attempted to do, but when the "Newport" started off the "Svea" attempted to follow them, but the water was coming in so fast that it was found necessary to swing the "Svea" into the beach about 10 miles away. Before the "Svea" got to the beach the water came into the engine room and put out the fires and it was necessary to anchor the vessel about two miles off shore. The crew stood by for several hours and the vessel continued to take water and she finally listed over on her side and the crew were picked up by a vessel that was standing by. During the night the "Svea" turned completely over and it was almost a complete loss. A day or two after that one of the vessels of the company came along there and picked up the "Svea", and with the aid of a coast

guard vessel, was able to tow her upside down from that point off San Luis Obispo County, to San Francisco, a most remarkable feat. When she was towed into San Francisco she was righted by means of derricks and placed in a dry dock and was subsequently repaired, and is now back on the run. The owners of the "Svea" filed a libel against the "Newport", and against the owners and the master of the "Newport", to recover damages in the sum of $151,000. This libel has been answered by the Pacific Mail Steamship Company and they have filed a cross libel against the owners of the "Svea", claiming damages from the owners of the "Svea" in the sum of $55,000. This has also been answered, and these libels and the cross libels make up the issues in the case.

A great many facts on both sides are admitted: The ownership of the "Svea" by the various part owners is admitted; the specifications of the "Newport" are admitted; it is admitted that Captain McKinnon, who is present in court, was master for the "Newport" at the time of the collision; it is admitted that the "Newport" ran into the "Svea"; it is denied by the Pacific Mail Steamship Company on information and belief that the "Svea" was badly damaged and she capsized after the collision; it is admitted that the weather was clear at the time of the collision; it is denied that the "Svea" maintained this course that I have pointed out to your Honor for approximately 38 minutes prior to the collision; it is admitted that at all times the "Newport" was on the port bow, or left hand side, of the "Svea", and that the "Svea" was at all times on the starboard bow of the "Newport"; it is denied that the collision was

entirely due to the fault of the "Newport"; it is denied that the "Newport" had incompetent officers on watch, and incompetent helmsman and incompetent lookout.

In paragraph 7 of the libel I wish to call your Honor's attention particularly to some facts which are admitted by the owners of the "Newport". Beginning at the fourth allegation at the bottom of page 4 of the libel: "That said Steamship 'Newport' at, and immediately prior, to the time of said collision, was violating Article 19 of the International Rules for preventing collisions, in that said vessel having the Steamship 'Svea' on the starboard of said Steamship 'Newport' did fail to keep out of the way of said Steamship 'Svea'."

Also the fifth paragraph on page 5: "That said Steamship 'Newport' at, and immediately prior, to the time of said collision was violating Article 22 of said International Rules for preventing collisions, in that it failed to pass astern of said Steamship 'Svea'."

Paragraph 6: "That said Steamship 'Newport' at, and immediately prior, to the time of said collision was violaitng Article 23 of said International Rules for preventing collisions, in that while approaching said Steamship 'Svea', and while it was obliged by the said International Rules to keep out of the way of said Steamship 'Svea', it failed to slacken its speed, and did fail to stop, and did fail to reverse its engines."

These allegations are specifically admitted by the answer and by the cross libel filed on behalf of the Pacific Mail Steamship Company on page 4 of their answer, paragraph 7, beginning at line 18, it is stated as follows: "Admit that said Steamship 'Newport' violated Articles 19, 22 and 23 of the International Rules for preventing collisions, as alleged in sub-divisions num-

bered fourth, fifth and sixth of said Article VII of the libel."

For your Honor's information I have a copy of the official publication of the International Rules.

THE COURT: I have it here, but I will take that if it is in more concise form.

MR. DORR: It is more concise and in parallel columns. The answer further denies neglect in other respects; denies that the mate and master of the "Svea" signaled to the "Newport" for assistance; admits that the "Newport" failed to stand by the "Svea"; denies that the "Svea" was in a badly damaged and sinking condition; admits that the "Newport" failed to give the "Svea" her name and other things required by the statute in case of collision, that is provided for in the Statute of 1890; denies, as I said, that the "Newport" failed to stand by.

Attached to our libel are certain interrogatories to which certain very material admissions are made in the answer. Referring to the eighth interrogatory: "What changes of speed, if any, in the engines of the Steamship 'Newport' were made after 9:30 a. m. on the 29th day of November, 1922, and prior to the time of the collision with the Steamship 'Svea'? A The engines were reversed from full ahead to full astern."

Interrogatory 9: "What changes of course, if any, were made by the Steamship 'Newport' after 9:30 a. m. on the 29th day of November, 1922, and prior to the time of said collision? A The helm was put hard astarboard."

It does not state in answer to those interrogatories that the change of helm and speed occurred. The

thirteenth interrogatory: "When was the Steamship 'Svea' first sighted, if at all, by those in charge of navigation of the Steamship 'Newport'? A About 9:45 a. m." That would be about 8 minutes before the collision, which occurred at 9:53, whereas the testimony of some of the officers which we shall introduce will show that the "Newport" was in sight for more than half an hour. The fifteenth interrogatory: "Was not the 'Svea' at all times on the starboard bow or starboard side of the 'Newport'? A Yes."

The seventeenth interrogatory: "Did the 'Newport' hit the port side of the 'Svea' about midships? If not, state where the 'Newport' did hit the 'Svea'. A Yes."

The eighteenth interrogatory: "What assistance, if any, was rendered by the 'Newport' to the 'Svea' after the collision? A. None. None was requested nor apparently needed."

The twenty-third interrogatory: "What whistle signals, if any, were made by either vessel at the time of the collision, and prior thereto while said vessels were within hearing of each other? A One, by the 'Newport'.

The cross libel which has been filed by the Pacific Mail Steamship Company against the owners of the "Svea" admits in paragraph 3 that *that* the Steamship "Newport" violated articles 19, 22 and 23. That is to correspond to the admissions in their answer, and they allege on information and belief that the collision was at least not due solely to said faults but was proximately caused or contributed to by faults on the part of the "Svea", in that she failed to alter her course; that she violated article 28 in failing to blow proper signals; that

in approaching the "Newport" which had disregarded her signals, she failed to slacken speed, and that she violated article 27 in failing to reduce her speed after receiving indications from the "Newport" that she intended to do nothing.

Damages are claimed from the owners of the "Svea" in the amount of $55,000, and in accordance with the rules of admiralty a stay bond on the cross libel was demanded of us in the sum of $70,000, although in view of the admissions of fault on the part of the "Newport" and the manifest character of the damage on the part of the "Svea", there could be no possible recovery on behalf of the "Newport". We called that matter to the attention of counsel and they voluntarily reduced the bond to $10,000 from $70,000, which bond we filed in order to proceed with our libel.

The admissions on the part of the "Newport" show plainly that the "Newport" was at fault, and, in fact, we might well rest at the outset and let the owners of the "Newport" assume the burden which they have of showing that the "Svea" was at fault.

There are some issues, however, which are disputed in regard to the course and maneuvers of the "Svea" and in regard to the damage, and in order to make our story complete, I will introduce such evidence as we have, which will be very brief. I will state that we have agreed in this case in accordance with the custom in admiralty cases that the decree of the court need not go into the question of damage, but that the matter of damage may be referred to a commissioner to take testimony and ascertain the amount of the damage after the interlocutory decree is rendered. That is correct?

MR. MACKEY: Yes, that is the usual matter of reference, which is reported back to the court.

THE COURT: I would like to ask you whether there is any agreement on this principle of law or whether it is a correct principle in admiralty law: This rule 27 seems to provide for the acceptance of the rules of the road in admiralty cases, and I wanted to ask if the courts in construing that section adopted a rule similar to the doctrine of the last clear chance in negligence cases.

MR. DORR: Not exactly. The situation which is presented in this case has been squarely passed upon by the Supreme Court of the United States in the case of the Delaware. That is reported in 161 U. S., page 459; 40 Law. Ed., page 771. The effect of proving fault upon the part of the "Svea" would not relieve the "Newport" of any liability for damages, as it might in a law action. There is a different rule in admiralty. The damages are divided in case of mutual fault, so that if the "Svea" and the "Newport" were both at fault, the "Svea" could recover from the "Newport" but one-half of the "Svea's" damage, from which is also deducted one-half of the "Newport's" damages.

THE COURT: The rule of contributory negligence is not applicable.

MR. DORR: Not as a complete defense. It cuts down the amount and the nature of the division of the damages. I wish to offer in evidence in behalf of the owners of the "Svea", the libelants and cross respondent, the depositions of Karl Rohberg, master of the Steamship "Svea", and Charles S. Semsen, chief mate of the Steamship "Svea", and John McKeown, third mate of the Steamship "Newport". The deposi-

tions cover a great many points that have been admitted in the pleadings. I will not read them entirely, but I wish to call your Honor's attention briefly to some testimony by the mate and the master of the "Svea". I will state that the claim of the Pacific Mail Steamship Company, it is no secret, they have pleaded it in their pleadings upon which they hope to recover, that the "Svea" having known the intention of the "Newport" and that the "Newport" was not obeying the rules of the road, the "Svea" should not have continued to hold her course and speed, but should have turned and stopped, and taken some action to avoid the collision.

THE COURT: In other words, invoked the application of that rule which I mentioned.

MR. DORR: Yes, your Honor. Referring to the testimony of the mate, Mr. Semsen, of the "Svea", on cross examination, on page 26, he testified as follows:

"Q If you had slowed down when you blew the first four blasts signal, what would have happened? A Well, if the other man went where he ought to go, he would have gone right into us and we would have been blamed for everything."

Turning to the testimony of Karl Rohberg, master of the "Svea", beginning at page 47, he testified as follows:

"Q You saw the 'Newport' about eight miles away, and from that time on until the time of the collision her bearing stayed the same? A Yes.

"Q When did you first have a doubt as to whether she was going to keep out of your way? You expected her to get out of your way, according to the rules of the road, did you? A Yes, sir.

"Q When did you first have a doubt that she was going to do that? A Just when we were about one

hundred feet apart, I guess. We were almost ready to have a collision, and at the same time the mate sung out 'Hard aport'.

"Q When you blew the second distress signal, did it not occur to you that there was something wrong on the 'Newport'? A No, I don't think so.

"Q You didn't see anybody on the bridge, did you? A I didn't see anybody, but I didn't know whether there was anybody there, or there was not anybody there.

"Q You couldn't see anybody there? A No.

"Q Didn't it occur to you that there was something wrong on her then? A No, it did not occur to me that way.

"Q What did you blow your distress signal for? A To call his attention to me. It did not look good to me then, the way things looked.

"Q You didn't think then he was going to keep clear of you? A No, but I just called his attention to it to keep clear of me.

"Q And you knew if he kept on you would come together? A No, I didn't know that, but it looked doubtful to me."

There is a lot more testimony along that line. Turning over to page 59, on redirect examination: "Q There have been some questions asked by counsel in regard to avoiding a collision by stopping after you blew your last four whistles; those answers that you made to those questions are based on the assumption, are they not, that the 'Newport' would hold its course and speed? A Yes, sir.

"Q Did you, in that situation, consider whether or not you should stop, or back, or whether you should hold your course and speed? A I did consider it.

"Q And what did you decide? A I decided to go ahead, that she is going to change.

"Q Why did you decide to go ahead? A Because I had the right-of-way.

"Q And what did you think that the other man might do? A That the other man might port his helm, or stop and back, or clear me; I did not consider which way, but I considered that he would clear me in some shape or other.

"Q What would have happened if you had slackened your speed, or stopped your engines, or reversed your engines in an effort to avoid a collision, and at the same time the 'Newport' had ported its helm? A There would have been a collision.

"Q And that was what the 'Newport' was obliged to do under the law, wasn't it, either that or some other step to avoid the collision? A Yes, sir.

"Recross Examination

"Q Your whole idea was that you were to hold your course and speed? A I was considering about whether I should take action.

"Q When did you consider that? A After the second four blasts.

"Q How long after, or was it at the same time? A Probably half a minute after, just a little after blowing the second four blasts and sizing up the things.

"Q As a matter of fact, you were thinking about it at the time you were blowing your four blasts signals? A No, after blowing it.

"Q How far apart were the vessels when you commenced to consider whether to stop, or to reverse, or to do something yourself? A Over a quarter of a

mile. I could only come to the conclusion that if I acted there would be some mistake, and so I came to the conclusion to keep my course and see.

"Q You were going to go right through with your course and speed, regardless of what he did? A I didn't know what he was going to do. I considered that if I acted, and if he acted, there would be a collision sure.

"Q When you began to figure on what you should do, you had some doubt as to what he was going to do, you had some doubt as to whether he was going to keep out of your way? A Yes.

"Further Redirect Examination

"Q It was only a doubt, though, wasn't it, Captain? A Only a doubt. There was a chance for him to go clear.

"Q You knew what his duty was, under the circumstances, didn't you? A I knew what his duty was, yes."

The deposition of the third mate of the "Newport", the officer who was on watch at the time of the collision, which was also taken by us, is very brief and simply brings out the fact that the "Svea" was at all times on the starboard side of the "Newport" and that he saw her first about 9:45, which was 8 minutes before the collision, and about one mile off, and that the weather conditions were fine and clear.

Now, I will call Mr. Hayes, chief engineer of the "Svea".

(Testimony of James Hayes.)

JAMES HAYES,

called as a witness on behalf of the libelants, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DORR:

Q Mr. Hayes, were you chief engineer of the Steamship "Svea" at the time of the collision?

A Yes, sir.

Q That was on November 29th, 1922?

A Yes, sir.

Q What license did you hold at that time, Mr. Hayes?

A Unlimited chief, sir.

Q Just speak up a little bit louder.

A Unlimited chief, sir.

Q How many engineers did you have besides yourself on the "Svea"?

A Two besides myself.

Q Two assistants?

A Two assistants.

Q Where were you at the time of the collision?

A I was in my room, sir, laying down reading, in my underwear.

Q Where was your room situated?

A On the port side, sir.

Q Upon deck?

A Up on deck, sir, on the poop deck.

Q Who was on watch in the engine room?

A The first assistant engineer, sir.

Q What was his name?

A William Reilly.

Q What was the name of the other assistant?

(Testimony of James Hayes.)

A Louis Norloff.

Q What time did you get off watch?

A 8 a. m.

Q That morning?

A Yes, sir.

Q What were the weather conditions?

A Just the same as they are now, except a little northwest wind.

Q Fine, clear, and sunshiny?

A Yes, sir.

Q How was your attention first called to the presence of another vessel, Mr. Hayes?

A I sleep on the port side and my door was on the hook. I was laying in my underwear reading, and along about that time I heard one whistle and laid the book down.

Q What whistle was that?

A This was the "Svea's" whistle.

Q What sort of a whistle did the "Svea" have?

A A loud, deep toned whistle.

Q A loud sounding whistle?

A Yes, sir, very loud.

Q Had you ever had any occasion to observe how far you could hear the "Svea's" whistle?

A No, sir, we never had no occasion to; it is a very loud sounding whistle.

Q After you heard the one blast on the "Svea's" whistle, what did you do?

A When I heard one blast of the "Svea's" whistle, I laid my book down. I thought it was peculiar and I

(Testimony of James Hayes.)

kind of listened again and I heard four. I heard one, then I heard one, two, three, four.

Q Four short blasts?

A Four short blasts, sir. Then I kind of took my time and got out of my bunk and by the time I got to the door, unhooked the door and the door swung back, I looked out and I found the "Newport" had struck her amidship. Then I just simply stood there. I put my overalls on and while I was putting my overalls on I was looking at the "Newport", and at the same time she drifted along aft towards the poop.

Q That is, towards the stern of your ship?

A Yes, sir.

Q Where was she with relation to where your room is located?

A Right in front of the room. My room is here, and she was drifting along here (indicating). I noticed an officer leaning over the rail and a colored fellow.

Q From where? What part of the "Newport"?

A Just below the bridge.

Q On the main deck?

A On the main deck.

Q On what is known as the hurricane deck?

A The hurricane deck, and I heard somebody sing out, "Stand by." By that time I never looked anywhere else; I just simply went down to my engine room and started up everything that was necessary to save the ship.

Q What did you start up?

A The pumps and siphons, and everything that is necessary to save the ship. The collision woke my

(Testimony of James Hayes.)

second engineer up and he came down below to the engine room.

Q Mr. Hayes, did you hear any other blasts of the "Svea's" whistle besides the signal blast and the four-blast signal that you have mentioned?

A No, sir, because when I went down below I was not thinking of that.

Q Did you hear anything before the four blasts?

A I was not taking no notice, but I heard that because it was so loud and the door was open. I didn't take no notice; I just went straight down below to start everything up that was necessary to keep the water out of the ship.

Q Did you hear any whistles from the "Newport"?

A No, sir.

Q None whatever?

A No, sir; never heard one at all.

Q When you got down to the engine room was the water coming in?

A Yes, sir; the water was over the low pressure carrying point.

Q Were you successful with your pumps in keeping the water down?

A No, sir; we could not hold it. It was raising until it put my high fires out. Then all I could do was to use my fire pump on top.

Q Were the engines finally stopped?

A The engines were finally stopped when she worked the steam off.

Q What happened when the engines stopped? Where was the ship at that time?

(Testimony of James Hayes.)

A Just a few miles off the beach.

Q Near Point Buchon?

A Near Point Buchon.

Q How long did you stay by the ship?

A I stayed by her until she almost turned over, until I got orders to leave her.

Q What time was that?

A Some time during the night. I would not exactly state the time, but later in the evening.

Q During the night did she completely turn over?

A She completely turned over, sir.

Q Mr. Hayes, I am handing you a photograph and ask you whether you recognize that as a photograph of the Steamship "Svea"?

A This is the "Svea", sir.

Q Is that the way she looked before the collision?

A Yes, sir.

Q Is that the way she was painted?

A Yes, sir.

Q Where was that picture taken?

A It has been taken in the dry dock, sir; I think it was taken at the Hanlon Yard, but I would not be sure of that. It is taken in a dry dock.

Q Does that photograph correctly show her condition before the collision?

A Yes, sir.

MR. DORR: I offer this photograph in evidence.

(Libelants' Exhibit No. 2.)

Q BY MR. DORR: Did you see the "Svea" when she was towed into San Francisco after the collision?

A Yes, sir.

(Testimony of James Hayes.)

Q Upside down?

Q Yes, sir.

Q I hand you a photograph and ask you if you recognize that as a photograph of the Steamship "Svea", showing the condition she was in when she was towed into San Francisco?

A Yes, sir; that is it.

Q Will you just point out on this photograph where the "Svea" is on the picture?

THE COURT: Have you seen those, gentlemen?

MR. MACKEY: Yes, sir, I have seen them.

A It is her upside down in the middle.

MR. DORR: I wish to offer this photograph in evidence.

(Libelants' Exhibit No. 3.)

MR. MACKEY: If you desire to offer those other photographs, I will admit that they are photographs of the "Svea" in the condition she was in in the dry dock.

Q BY MR. DORR: That shows the condition she was in after the collision?

A That shows the condition she was in after the collision after being towed into San Francisco.

MR. DORR: I now offer in evidence the photograph showing the cut in the port side of the "Svea".

(Libelants' Exhibit No. 4.)

MR. DORR: I now offer in evidence the photograph showing the view looking forward on the deck of the "Svea".

(Libelants'Exhibit No. 5.)

MR. DORR: Next the photograph looking after on the deck of the "Svea".

(Testimony of James Hayes.)

(Libelants' Exhibit No. 6.)

MR. DORR: All of which are admitted by counsel to be photographs showing the condition of the "Svea" after she was dry docked in San Francisco immediately following the collision. The libel which is filed on behalf of the owners of the "Svea" is also on behalf of the officers and crew of the "Svea", who lost their personal effects. Counsel for the Pacific Mail Steamship Company has stipulated that we do not need to prove the respective members of the crew at the present time. That may be a matter that may be included in the reference to the commissioner.

MR. MACKEY: I will, of course, Mr. Dorr, insist that those who appear before the commissioner, and who claim indemnity, will have to satisfy the court that they were members of the crew and that they lost their clothing, effects, and so forth.

MR. DORR: Perhaps I had better ask the chief engineer a few more questions:

Q Was Karl Rohberg captain of the "Svea"?

A Yes, sir.

Q Do you remember the name of the mate?

A Semsen.

Q Charles S. Semsen?

A Yes, sir.

Q Who was the second mate?

A Charles Anderson.

Q And you, James Hayes, was the chief engineer?

A Yes, sir.

Q Was Harry Walton on board?

A He was the cook, sir.

(Testimony of James Hayes.)

Q Was William R. Reilly on board?

A Yes, sir; he was assistant engineer, sir.

Q And Louis Norloff, I think you testified, was second assistant?

A Second assistant, sir.

Q Was Robert White on board at the time?

A Fireman, sir.

Q And John McDonald?

A Fireman, sir.

Q Was John Sett Strand on board, also, referred in the libel as Sett Strand?

A Yes, sir.

Q Do you remember a man by the name of George Dolan?

A I think I do. I think he was a winch driver. There is one or two that I can not remember.

Q You do not remember the names of the sailors, do you?

A No, sir.

Q All of those you have mentioned were on board at the time of the collision?

A Yes, sir.

MR. DORR: Cross examination.

CROSS EXAMINATION

BY MR. MACKEY:

Q How long had you been chief engineer of the "Svea"?

A At the time of the accident, sir?

Q Yes, at the time of the accident?

A 12 months.

Q 12 months?

(Testimony of James Hayes.)

A A little over 12 months.

Q The engines were in good condition, were they?

A Yes, sir; swell condition.

Q They could be reversed very rapidly?

A Yes, sir; you could reverse your level in about 2 seconds, and you could reverse your engines in around about 5 seconds.

Q It was an ordinary reciprocating engine, was it?

A Yes, sir; 750 horse power.

Q Of normal power for a schooner of that size?

A Yes, sir.

Q Had you ever had any occasion to notice how rapidly the ship would respond to the backing of the engines?

A She responds very quick below; she takes water very quick below; what she would do above, I had no reason to watch that at all.

Q Did you have a right turning screw?

A Yes, sir.

Q That would make the ship back to port when you reversed your engines?

A Yes.

Q That is, your stern would move to port if she backed?

A Yes, sir.

Q So far as you know, the "Svea" was the ordinary steam schooner, of the ordinary class and type, and maneuvered like the rest of them?

A Like the rest of them.

MR. MACKEY: That is all.

(Testimony of James Hayes.)

REDIRECT EXAMINATION

BY MR. DORR:

Q Mr. Hayes, a question or two that I overlooked. What become of your engine room log book after the collision?

A I had that in my bunk, sir, and I had some of my clothes there, and I was going to take them as soon as I got a chance, but the water was coming into the engine room from the port side and the way she was turning, the captain gave me orders to leave the ship, and the ship turned and I just managed to get into the boat.

Q In other words, the log book was lost?

A I lost everything; I could not get into my room. She just turned over that way (indicating).

Q. Did you have any record of the bells on the "Svea", the bells recorded on the "Svea", besides the log books?

A Yes, sir; I had a bell book.

Q I hand you a book with a black leather covering and ask you if you recognize that as your bell book?

A Yes, sir; that is my bell book.

Q Are there any entries made in that book of the bells at the time of the collision?

A Yes, sir. I told the first assistant to take the bells, and while he was taking the bells and handling the engine, my other assistant and my fireman came to give me a hand on the pumps.

Q Where is your first assistant now?

A He is back in Europe.

(Testimony of James Hayes.)

Q That is Mr. Reilly. He is in Europe at the present time?

A Yes, sir.

Q Did he record those bells in your presence in this bell book?

A He recorded those here (indicating). It is in his handwriting.

Q That was produced by Mr. Reilly and sworn to by him?

A Yes, sir.

Q The bottom of the page is your handwriting?

A Yes, sir; the bottom of the page down here is my handwriting.

Q Those entries in regard to the bells are made in the hieroglyphics in common use in the engine room, are they not?

A In the engine room.

Q Will you read the entries beginning at the top of the page, November 27th?

MR. MACKEY: I don't think that it is proper to read these unless they were made by this witness, or known to be absolutely correct.

MR. DORR: They were made in his presence, he testified.

THE WITNESS: They were made in my presence.

Q BY MR. MACKEY: Were you on watch?

A Yes, sir. I was down in the engine room at the time.

Q Were you on deck at the time of the collision?

A Yes, sir. Those were the bells afterwards.

Q You did not make those entries at all?

(Testimony of James Hayes.)

A No, sir; the first assistant makes those entries in the bell book. That is what they had down in the engine room. That is what the first assistant used.

Q BY MR. DORR: Do you know what time the collision occurred?

A I looked at my clock—I have a clock hanging right in front of my bunk, and it was 7 minutes to 10. I would not state that my clock was right to the minute.

THE COURT: That would be 9:53?

A 9:53.

MR. MACKEY: I have no objection, Mr. Dorr. The bell book may be admitted in evidence.

Q BY MR. DORR: Will you just read from the record, Mr. Hayes, the bells on this page which were recorded at the time of the collision?

A (Reading) 9:53 stop; 9:53 struck by "Newport"; 9:54 half ahead; 9:56 stop; 9:58 slow ahead; 10:01 slow astern ship making water. Put all pumps on bilges; 10:15, full speed astern; 10:20, plates. William Reilly, first assistant.

Q BY MR. DORR: Could you from your room on the port side of the ship hear any bells given the engine room from the bridge?

A Yes, I could hear them. If I had my door wide open, I could hear the bells, naturally.

Q Do you know if there was any bells given prior to the stop bell at the time of the collision?

A I don't think there was.

Q BY MR. MACKEY: That bell book is supposed to contain all of the bells, is it not, chief?

A The principal bells.

(Testimony of James Hayes.)

Q If there was a bell to stop, it would be there?

A If there was a bell to stop, it would be there.

Q BY THE COURT: What do these hieroglyphics mean?

A That means stop.

Q What are those four horizontal lines with one vertical line across?

A That is slow.

Q What is this one?

A That is slow ahead. This is stop. Ahead is that way. Slow ahead would be that way. Half ahead would be this way, and astern this way (indicating).

Q Are those standardized symbols that all ships use?

A Yes, sir; all ships.

MR. DORR: I think that is all.

MR. MACKEY: Chief, for the convenience of the court and as a matter of record, will you write on this sheet of paper the symbols for the various maneuvers of the engines, and immediately after, in the column adjacent, put what each signal means? I mean write the symbol for full ahead and then opposite that write in English "full ahead", so it will be explanatory on its face. Now, put half ahead by symbol, then write it out, slow ahead, and then stop. Write in the word "stop", if you please.

(Witness does so.)

Mr. Mackey: I offer this sheet of paper, upon which the symbols, and the English explanation adjacent, have been written by the chief.

MR. DORR: No objection.

(Respondents' Exhibit A.)

(Testimony of James Hayes.)

THE COURT: Q. Is there a reverse symbol also?

A Stand by, sir.

Q That is the same as stand by?

A That is stand by at the bottom.

Q Is the term "stand by" the same as "reverse"?

A No, sir; full astern, I think.

MR. DORR: Full astern and half astern.

Q BY THE COURT: You understand what I mean by reverse engines?

A Yes, sir.

Q Each of these terms indicate reverse engines?

A Full astern. If you are full ahead and you get a signal astern, you reverse your engines from full ahead to full astern.

Q BY MR. DORR: That is to say, in order to full astern on your engines you have to reverse your engines?

A I have to reverse my engines.

Q And the symbol used is full astern?

A Full astern.

Q BY THE COURT: Are these the symbols that are used in the service?

A Yes, sir.

MR. DORR: The libelants and cross respondents will rest at this time, if the court please.

MR. MACKEY: If your Honor please, the cross libel perhaps does not specifically refer to all of the rules by number that we have in mind. I mean the rules of the road. I think, however, the charges of fault against the "Svea" are sufficiently broad to include them, but if your Honor thinks not, I would like per-

(Testimony of James Hayes.)

mission to amend to refer specifically to the violations of articles 21 and 29. They are really within the same scope as article 27 referred to, but are further rules of precaution. Article 21 is the rule which says that the "Svea" should keep her course and speed and contains a note or provision for action in the event a collision is immediate and pending.

THE COURT: Any objection?

MR. DORR: The amendment, if the court please, is inconsistent with the admissions which the Pacific Mail Steamship Company has already made in their answer and in their cross libel, namely, that the "Newport" was bound to keep out of the way and failed to do so, and that she held her course and speed. Now, if the "Svea" was bound to do something else, then it would be inconsistent with the admissions which have already been made.

MR. MACKEY: No inconsistency at all, your Honor. We are invoking the same principle throughout, namely, that under the conditions prevailing at the time, the "Svea" should have taken some action to avert the collision, and so far as those rules apply to that situation, there is no inconsistency whatever.

MR. DORR: I believe it is admitted as alleged in paragraph 6 of our libel that the "Newport" failed to pass astern of the "Svea", that the "Newport" failed to slacken its speed, and failed to stop, and failed to reverse its engines. That could only be true on the theory that the "Svea" was bound to keep its course and speed.

MR. MACKEY: Not at all.

(Testimony of James Hayes.)

MR. DORR: Your contention is that the violation of the rules referred to could only be true on the ground that the "Svea" was not obliged to keep her course and speed, but was obliged to do something else.

MR. MACKEY: Not at all, Mr. Dorr. The theory upon which the pleadings are framed, and it is so alleged in the cross libel, that although the "Newport" was the burdened ship and was bound to keep out of the way and should have gone astern the "Svea", she didn't do so, and it was apparent to the "Svea" that she was not going to do so, that the "Svea" should have taken some action herself to avert the collision. Subdivision No. 3 of article 3 of the cross libel reads, referring to the "Svea": "That she failed to reverse her engines until the instant of the collision and too late to avoid the collision."

Sub-division 4: "That she failed to alter her course until the instant of the collision and too late to avoid the collision." 5: "That she violated article 28 of the International Rules for preventing collisions in that she did not blow the signals required by said article, and blew signals in violation of said article." 6: "That approaching the 'Newport', which had disregarded her signals and which gave no indication of heeding them, she failed to stop or slacken or take any precaution to avoid the impending collision." I have mentioned the particular articles that I have in mind so there may be no doubt.

Now, counsel has stated in a general way our position. We rest primarily upon the theory that the "Newport" being twice as long as the "Svea", and

(Testimony of James Hayes.)

four times her tonnage, would have taken much longer than the "Svea" to act; that the "Svea" having seen the "Newport" for 8 miles away when she was going 8 miles an hour, and having proceeded to a point where they were 2 miles apart, and observing throughout that time that the bearing of the "Newport" had not changed, and knowing that when the bearing did not change the vessels were bound to come together unless one of the two ships should change course or speed, that she at 2 miles away blew one blast and received no response; that subsequently the mate put his glasses on the bridge of the "Newport" and saw no one there; that when they were about a mile away the "Svea" blew four blasts, which was indicative that the "Svea" realized something was wrong; that the bearing was still the same, and that there was still no action on the part of the "Newport", and when they were between three-eighths and a half mile apart the "Svea" blew another danger signal and continued to keep her course and speed, notwithstanding the fact that the "Newport" was doing the same thing and notwithstanding the fact that those on the "Svea" could see no action at all upon the bridge of the "Newport" or any tendency to abide by the rules of the road, but notwithstanding continued right up to 100 feet of the collision before ever taking any action at all, and then when they did take action they threw their ship right across the bow of the "Newport". It is true we could not complain too severely of the last helm action because at that time there was no doubt great excitement on the part of somebody, but she should never have come to that point. The rule in the case of the "Delaware", which has been referred to—

(Testimony of James Hayes.)

MR. DORR: Do you maintain that there was no one on the bridge of the "Newport"?

MR. MACKEY: I don't know, Mr. Dorr, whether there was anyone there or not. I have never been able to get an explanation from the third officer as to what happened. My personal opinion is that he was not on the bridge of the "Newport". It was a most extraordinary thing. We have no question at all but what the "Newport" was at fault. That is admitted in the pleadings. There is no need of discussing or going into what she was doing at all. Our contention is that the "Newport" was coming, and that the "Svea" saw her coming, saw her from 8:50 in the morning to 9:53, and had blown three signals without response, and had proceeded, keeping her course and speed, which, under rule 31, she had a right to do, but, if your Honor please, not at all consequences or at all events. The rule in the case of the "Delaware" in which case the preferred vessel was exonerated, the court says: "The cases of 'The Britannia,' 153 U. S., 13, and 'The Northfield', 154 U. S., 629, must be regarded, however, as settling the law that the preferred steamer will not be held in fault for maintaining her course and speed, so long as it is possible for the other to avoid her by porting, at least in the absence of some distinct indication that she is about to fail in her duty", and we say she had indication that the "Newport" was about to fail in her duty. I doubt if any collision case will be cited, or can be found, in which the conditions are such as we have in this case in which the privileged vessel was exonerated.

(Testimony of James Hayes.)

MR. DORR: Yes, I have two others.

MR. MACKEY: Exactly the same?

MR. DORR: As nearly as I can possibly get them.

MR. MACKEY: The rule in the case of the "New York" is stated by the court as follows: "It is the duty of the steamer receiving signal whistles from an approaching steamer to answer them promptly, but it is also the duty of such approaching steamer, on failure of the other to answer, to stop until her silence is explained and her course ascertained with certainty." That case is cited in 175 U. S., page 187; 44 Law Ed., page 126.

I will cite other cases, your Honor, but I would like to read one more here. This case is the case of the "Admiral Watson", 266 Fed., 122, where the court reviews the law to a certain extent. In that case the "Adimral Watson" was the privileged vessel, but both were held at fault. The court said: "The fact that a vessel is privileged, and entitled to hold her course, does not excuse her from adopting such precautions as may be required by statute, and necessary to prevent a collision", citing "The New York", where it quotes: But the fact that a steamer is entitled to hold her course does not excuse her from inattendance to signals, from answering where an answer is required, or from adopting such precautions as may be necessary to prevent a collision, in case there be a distinct indication that the obligated steamer is about to fail in her duty, as was said in the case of "The Sunnyside", 91 U. S., 208: "Cases arising in navigation, where stubborn adherence to a general rule is a culpable fault, for the reason that

(Testimony of James Hayes.)

either navigator ought to know that the rules of navigation are ordained, not to permit collisions, but to save life and property by preventing such disasters.

Then referring to the particular fact, the court says: "The master of the 'Helgeland' must have known if he continued in his course a collision was inevitable. He did not give a danger signal or stop his engines or reverse." Then it quotes again from the "New York": "The lesson that some vessels must stop their engines in the presence of danger, or even of anticipated danger, is a hard one to learn; but the failure to do so has been the cause of the condemnation of so many vessels that it would seem that these repeated admonitions must ultimately have some effect." Then referring to the particular case: "From what has been said it is apparent that the 'Watson' was grossly at fault. She failed to answer the signal. She did not maintain a proper lookout. But her unlawful and negligent conduct did not justify the 'Helgeland' to continue in a course the inevitable result of which was a collision in violation of her statutory duty, when the course of the approaching vessel was uncertain or in doubt and her first signal unanswered."

MR. DORR: What court was that decided in?

MR. MACKEY: Judge Neterer in the Western District of Washington. Now, I call the court's attention to the answer of the owners of the "Svea" to the cross libel of the Pacific Mail Steamship Company on page 4, which reads in part, on line 9, beginning on line 9: "Deny that Steamer 'Newport' gave no indication of heeding the Steamer 'Svea', but admit that the acts

(Testimony of George McKinnon.)

of the 'Newport' were such as to raise a doubt as to whether she intended to obey the rules of the road."

Call Captain McKinnon.

GEORGE McKINNON,

called as a witness on behalf of respondents, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MACKEY:

Q Where do you live, Captain?

A 1208 Wall Street, San Francisco.

Q How old are you?

A 75.

Q How long have you been going to sea?

A 60 years.

Q What papers do you hold?

A Master's.

Q Are you still the master of the "Newport"?

A Yes, sir.

Q You came up from the Panama Canal, did you, for this trial?

A I came up from Central America.

Q How long have you held your master's papers?

A 32 years.

Q You are commodore of the Pacific Mail fleet?

A Yes, sir; I am the oldest man in their service.

Q Have you ever been in collision with one of your ships before?

A No.

Q How long have you been with the Pacific Mail people?

(Testimony of George McKinnon.)

A 46 years.

Q This collision was on November 29th, 1922, the one with the "Svea"?

A Yes.

Q Were you on the bridge at the time of the collision?

A Yes.

Q How long had you been there?

A About 10 seconds.

Q Who was the navigating officer of the "Newport"?

A The third officer.

Q What course was the "Newport" on?

A Magnetic course, east by south.

Q Where did the collision occur?

A Off San Luis Obispo.

Q Your time recorded the collision also as 9.53, didn't it?

A Yes, 9:53.

Q. Did you see the "Svea" before the collision?

A Yes, I did see her.

Q Where were you at the time?

A I was down below in the toilet.

Q How long had you been off the bridge?

A Oh, about 20 minutes.

Q What was the direction of the "Svea" from the "Newport" when you saw her?

A Three points on the starboard, 600 feet off.

MR. MACKEY: Referring to this diagram, I might say, Mr. Dorr, I would like to introduce this diagram in evidence.

(Testimony of George McKinnon.)

MR. DORR: It is not intended to be accurate. It was merely to illustrate my opening statement. I don't intend to be bound by any of those measurements.

MR. MACKEY: Neither do I.

THE COURT: Is it drawn to scale?

MR. DORR: I drew the angles and the scale is 6 inches to the mile. It was drawn to scale as closely as can be given and the position of the "Newport" was taken by drawing parallel lines all the way down. It is not accurate at all.

THE COURT: It is merely for the purpose of illustration?

MR. DORR: Yes, sir.

MR. MACKEY: That is the purpose of the offer, your Honor.

THE COURT: It may be received.

Q BY MR. MACKEY: Referring to this diagram, Respondents' Exhibit B, when you saw the "Svea", was she coming in the general direction indicated by this line marked here, northwest by north, one-half north?

A That looks more like a right angle.

Q Have you reference to this course here, south 79 degrees east?

A Yes.

Q Is that about the way she was coming?

A That is practically correct, as near as you can get it.

Q What was the visibility on the morning of this accident?

A Fine, clear morning. You could see all around the horizon, 10 or 12 miles.

(Testimony of George McKinnon.)

Q How long is the "Newport"?

A 337 feet long.

Q What is her gross tonnage?

A 2600 and some odd, I forget now.

Q She is 2643 tons?

A Yes, 2643, I think, to be correct.

Q What was the speed of the "Newport" on the morning of the collision?

A Doing about 9 miles an hour.

Q You were fully loaded, were you?

A Yes, sir.

Q Do you know what your draft was?

A 19-6.

Q Was that on even keel?

A About even keel, 19-6 forward.

Q BY THE COURT: What is the meaning of that term, on an even keel?

A Just drawing as much water forward as aft.

Q BY MR. MACKEY: Do you know what I mean when I speak of the turning radius of a ship?

A Yes.

Q What does that mean?

A The circle that I make going around?

Q Yes.

A It will take me a mile and three-quarters to two miles to go round.

Q That is the circumference?

A Yes, the circumference.

Q That is, if you put your helm hard to port?

A You will subscribe a circle three miles, putting her hard aport or starboard.

(Testimony of George McKinnon.)

Q Is that loaded or light?

A Loaded.

Q Loaded as you were on the morning of this collision?

A Yes.

Q From your experience in handling ships, would you be able to tell me whether the "Svea" would require as much space, or more space, than the "Newport" to turn in? That would be answered yes or no.

MR. DORR: I would like to inquire as to what his experience is with respect to the type of vessel of the "Svea".

A I know, anyhow, a man don't need to know any ship to know what to do. The little "Svea", you could turn around in twice her length, anyhow.

Q BY THE COURT: Loaded, Captain?

A Loaded, yes.

Q BY MR. DORR: Have you ever had any experience with vessels the type of the "Svea"?

A No.

Q BY MR. MACKEY: Have you seen them turn around?

A Yes, I have seen them turn around. Some of them will turn around right on their heel.

Q Captain, I wish to put to you the following question: Assuming such a vessel as the "Svea" approaching a vessel the type of the "Newport", and the Svea" sighting the "Newport" 8 miles away and on a course crossing her own and bearing about 3 points on the port bow, and assuming that the "Svea"-type of vessel proceeds until the vessels are within two miles of each

(Testimony of George McKinnon.)

other, whereupon the "Svea" type gives one blast on her whistle and she keeps her course and speed throughout, and when the vessels are about one mile apart, the "Svea"-type of vessel gives four blasts on her whistle, and when the vessels are between three-eighths to half a mile apart the "Svea"-type vessel gives another signal of four blasts, and that she gets no response from any of those signals; that she sees no one on the bridge of the approaching ship, and she sees no tendency on the part of the approaching ship to keep out of her way as she is obliged to keep out, state whether or not from your experience as a master mariner whether an ordinarily prudent master would deem that sufficient notice that the approaching vessel was about to fail in her duty of keeping out of the way and warrant the privileged vessel in changing her course or speed?

MR. DORR: I wish to interpose an objection to the question because the duties referred to by counsel are fixed by law and are not a matter of opinion; furthermore that the facts assumed as the basis for the hypothetical question are too indefinite as to the point at which the "Svea", the privileged vessel, is obliged to make up its mind.

THE COURT: It seems to me that that is not the proper subject matter of a hypothetical question, Mr. Mackey. I think that is the ultimate fact which is to be answered by the court from the narrative of the facts.

MR. MACKEY: The purpose of the question, your Honor, or the question is designed to develop what a man of seafaring experience would do under the cir-

(Testimony of George McKinnon.)

cumstances, as, I take it, the rule applicable in a state of this kind is what would an ordinarily prudent navigator do under those circumstances. It is not, as counsel would insist, a rule which is inflexible and which does not take into consideration what good seamanship is. I might say that article 29 reads: "Nothing in these rules shall exonerate any vessel or the owner or master or crew thereof from the consequences of any neglect," then reciting several things there, "or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case." Now, I call the court's attention to the case reported in the 113th Fed., 541, where the court says: "The question here is whether, at the time the 'Reliance' changed her course, the officer in command was justified in believing that the 'Zampa' was about to fail in her duty to keep off." This is a case where the privileged vessel was exonerated from changing its course. "And that there was immediate danger of collision, unless her course was changed. She had a right to depart from her course if necessary in order to avoid immediate danger and having this right, it must follow that, if the officer in command exercised a reasonable judgment in view of all of the conditions then present, the action taken by him in changing the course of the 'Reliance' can not be attributed to her as a fault. This general principle stated in different language has often been announced. Thus: That when the vessel that has the burden of avoiding the danger has come so near that, to a reasonable, firm and skillful navi-

(Testimony of George McKinnon.)

gator it appears that the collision is unavoidable, it shall be taken to have been so."

Now, I think what ordinary, prudent and skillful navigators would do under the circumstances and what they would judge from the conditions, in the absence of warnings and in the absence of seeing anything on the "Newport", is material. I think it is the ultimate fact to be decided by the court, true, but I think the court should have the aid of persons who have this experience.

THE COURT: Well, could it be determined by a hypothetical basis? Isn't it necessarily determined by the actualities rather than by the specifications? In other words, is the converse of the rule announced in that "Zampa" case? The rule of the decisions, and as I understand that case, provide that a vessel, notwithstanding the rule that it must maintain its course and speed, that there may be a time of an expected collision where a deviation from that rule would be reasonable care. Now, has there been any case that has announced the converse, that the vessel should deviate from the requirement of the statute, or if there has not been, shouldn't it be determined by a narrative of the facts as to whether the master of the burdened ship did all that the law required rather than a statement by an expert that in his opinion it would be reasonable care, because that is the ultimate fact, as I view it, for the court to decide, whether or not there was any negligence on the part of the privileged ship. I think the case should be confined to a narrative of what occurred. It seems to me that the same rule would

(Testimony of George McKinnon.)

be applicable as would be applicable in an ordinary collision case on a steam railroad, for instance, the application of the last clear chance doctrine, which I mentioned at the beginning. I am sure it would not be competent for an engineer to testify that it would be reasonable care and prudence on the part of the engineer to do thus and so; he would be called upon to say what he did and tell the circumstances of the collision itself, and that would be before the court, and from his testimony, along with the other facts and circumstances, the court must answer the question whether he did what a reasonably prudent man would do under the circumstances.

MR. MACKEY: But at sea on a vessel where masters are accustomed to hearing signals and observing movements of another ship and determining from what they see and hear whether or not to slow down or what course to pursue, it seems to me that they are in an excellent situation for advising the court as to what an ordinarily prudent master would resolve out of the facts as presented here.

THE COURT: That may be. On account of the language of this section I didn't have in mind the converse.

MR. MACKEY: It is certainly a rule of good seamanship, which is applicable in this case, whether or not to proceed in a course throughout under these circumstances.

THE COURT: I hadn't in mind the converse of this article 29 which reads as follows: "Or of the neglect of any precaution which may be required by the or-

(Testimony of George McKinnon.)

dinary practice of seamen." It might be relevant to show the practice of seamen. It seems to me that the evidence would have a rather meager weight where there is, I think, a better and more secure type of evidence that could be elicited than the hypothetical question. It is simply a question of the weight or value of the evidence. I don't attach much value to it, however.

MR. MACKEY: Then, your Honor, I will reframe the question to recite the facts and ask the Captain what he would do.

MR. DORR: I just want to add an observation to that rule that has been stated by counsel. It will be noticed that rule 29 says "Nothing in these rules shall exonerate any vessel or owner or master or crew thereof from the negligence of any neglect to carry any lights or signals or any neglect to keep a proper lookout or of the neglect of any precaution which may be required by ordinary practice of seamanship, or by the special circumstances of the case." Now, the Supreme Court has held definitely on that section that there is nothing in these rules that require these things to be done. It says these rules shall not change anything that has heretofore existed in maritime law. The "Bluejacket" is authority on that question of lookout, the Tacoma Mill Co. vs. The "Bluejacket". It calls attention to the wording of that section; it says that the rules do not require a lookout to be kept and do not require the things to be done that are mentioned in this section, but these rules shall not exonerate a person from doing those things which are otherwise required by maritime law. Now, the position of the Pacific Mail Steamship

(Testimony of George McKinnon.)

Company is this: That the Steamship "Svea" did not navigate properly immediately and prior to the collision. The testimony upon which they must base their claim necessarily is the testimony of the officers on the "Svea" as to what was done and what could have been done and what they did do, and if there is anything that they failed in doing they must depend on the officers of the "Svea". That has already been introduced in evidence, the story of the captain and the mate. The depositions are already in.

THE COURT: I think, perhaps, that is not true just as you have expressed it, otherwise it would foreclose the real inquiry into the questions of fact as relative to the activities of the two vessels. Supposing, for instance, the officers of the "Svea" clearly testify that there was no one on the bridge of the "Newport", and supposing the officers of the "Newport" would testify that there was no one on that bridge at a certain time?

MR. DORR: Any questions of that kind, I quite agree, should be taken into consideration, but so far as any opinion as to what would or could have been done—

THE COURT: I have already discussed that.

MR. MACKEY: I don't think for a minute that I am bound by the opinion of your master and mate as to what should have been done. I agree I have to look out of the record to find out what was done.

MR. DORR: That is true. The law fixes what has to be done.

THE COURT: Let us get along, gentlemen; I think we are discussing academic questions. The objection to the hypothetical question will be sustained.

(Testimony of George McKinnon.)

THE WITNESS: If you will allow me to say something.

THE COURT: I don't know as you can help us any, Captain. This is more of a legal question.

MR. MACKEY: I don't know as I understand your Honor, but I will ask this question with a view of finding out what has been said, and if I am in error I expect it will be objected to on the same ground. It will be hypothetical to the extent that I state the facts to the Captain and ask him what he would do as a master mariner.

MR. DORR: I will make the same objection.

THE COURT: I am not saying but what expert testimony as to what the officer of the "Svea" did is not competent and relevant. In other words, you may show what they did, assuming that you will concede that what they did is clearly shown by the testimony. I think you have a right to offer expert testimony to show what they did was not good seamanship.

MR. MACKEY: That is it, your Honor.

THE COURT: That was not the purport of the other question. The purport of the other question was to show that what the officers of the "Newport" did was ordinary care in so far as good seamanship was concerned.

MR. MACKEY: I think you misunderstood the question, your Honor, unless I misnamed the vessels.

THE COURT: You had better reframe your question.

Q BY MR. MACKEY: Captain, the evidence shows that the master of the "Svea" sighted the "Newport"

(Testimony of George McKinnon.)

three points on its port bow at about 9:20 a. m. on a course crossing his course, as much as east by south 800 feet northwest by north one-half north; it was a clear ,fine morning; the "Newport" remained in sight from then on until the time of the collision; her bearing did not change at any time; when the vessels were two miles apart, approximately, he blew one blast on his whistle and got no response from the "Newport"; when the vessels were about a mile apart he blew four blasts on his whistle and received no response from the "Newport"; when the vessels were between three-eighths of a mile and half a mile, or at least a little more than three-eighths of a mile apart, he blew another danger signal of four blasts and received no response from the "Newport"; prior to this time on various occasions from the time the vessels were 6 miles apart until they were 1 mile apart the mate of the "Svea" had been on the bridge and looked at the bridge of the "Newport" through the glasses and saw no one present thereon and at no time was there any indication or showing on the part of the "Newport" that she was going to keep out of the way, and, as stated, the bearing of the "Newport" on the "Svea's" bow remained the same throughout. Under those circumstances, from your experience as a master mariner, what would you say the rule of good seamanship would dictate?

MR. DORR: I wish to object to that question on the ground it is not based upon all of the testimony; the facts show that while there was no indication that the "Newport" would keep out of the way, there was also no indication that she would not keep out of the way.

(Testimony of George McKinnon.)

That is the full testimony of the officers of the "Svea", and the hypothetical question is not based upon the testimony. Furthermore that the movements of the "Svea" under those conditions are a matter of law and the law has been fully decided by the Supreme Court under the very same conditions.

THE COURT: Objection overruled.

MR. MACKEY: Answer the question, Captain. Did you understand the question?

A Yes, I understand your question.

Q What would the rule of good seamanship dictate under those circumstances?

A If I thought I could clear them by going with my helm hard to starboard, I would do so; if I could not, I would use my own judgment, I would stop or back; I would keep away from the ship, I would not run onto her.

Q Under those circumstances that I have stated to you would you consider the situation such as would justify a change of course and speed on the part of the "Svea"?

A Yes, certainly. When ships get within a half mile of one another it is time to do something, no matter what the kind or type of the ship. When they get within a half a mile they ought to do something, notwithstanding any rules or regulations of what a man has to do.

MR. MACKEY: Take the witness.

CROSS EXAMINATION

BY MR. DORR:

Q You said you left the bridge about 20 minutes before the collision?

(Testimony of George McKinnon.)

A Yes, sir: 20 minutes.

Q That was possibly around 9:35?

A 9:30, I think. We have it in the log book.

Q That was the time you changed your course?

A That was the time we changed.

Q Who was on watch at that time?

A The third officer.

Q Mr. McKeown?

A Yes, sir.

Q Where was he standing on his watch, on the bridge?

A He said he was on the bridge. I think he was in the chart house.

Q That is a new idea with you, is it not?

A No, I don't think it is. I think that is what I said on the first examination before the United States Inspector.

Q Did you ever make such a statement as that before?

A Yes, sir; before the United States Inspectors.

Q When you came back up on the bridge he was on the bridge, was he not?

A He was on the bridge when I come up there.

Q What excuse did he give for not avoiding the "Svea"?

A He said he didn't see her.

Q You gave some instructions to your officers about standing watch on the bridge, did you not?

A This young man was just keeping his first watch on ship; he just shipped the day before, and was making his first voyage.

(Testimony of George McKinnon.)

Q You never made any such a statement before the United States Inspectors that this man was off the bridge at any time?

MR. MACKEY: I object to you suggesting that the Captain said that the man was off the bridge.

MR. DORR: He made the statement.

MR. MACKEY: The Captain said he thinks that he was off the bridge.

Q BY MR. DORR: Didn't you state that you made the same statement before the inspectors?

A That is what I said. I said he was on the bridge, but I told the inspectors that I think he must have been in the chart house.

Q He said he was on the bridge?

A That he said that he was on the bridge.

Q The only thing upon which you base your statement now that he was not off the bridge is your opinion?

A He was there when I come up on the bridge.

Q He was there when you left?

A He was there when I left; yes, sir.

Q And the bridge of the vessel runs from one side of the vessel to the other?

A Right across.

Q In the clear?

A In the clear.

Q And immediately below the bridge is the wheel house?

A Yes, sir.

Q Where the man at the wheel steers the ship?

A Yes, you speak to the man at the wheel from the bridge.

(Testimony of George McKinnon.)

Q And from that wheel house he looks out ahead?

A Looks out ahead.

Q It is one of the sailors on the ship that steers the ship?

A The quartermaster.

Q And the officer on watch walks back and forth?

A He looks out for the ship; he keeps watch and the quartermaster steers the ship.

Q BY THE COURT: Is the quartermaster supposed to keep a lookout at all?

A Yes sir.

Q He is supposed to look out as well as to hear orders from the officer above?

A Yes, sir.

Q BY MR. DOOR: Who was on the bridge with the second mate or the third mate?

A Nobody was on the bridge.

Q Isn't there another quartermaster who is not steering?

A There is only one quartermaster that steers.

Q Another one that sounds the bilges?

A He sounds the bilges every hour and works around the deck.

Q He does that when he is not steering?

A Yes.

Q Have you produced your third mate in court here?

A No, he is not here.

Q Is your quartermaster here, either of them?

A No, this is 18 months ago since that happened. The Lord knows where they are now.

Q Neither of the quartermasters nor the third mate are here?

(Testimony of George McKinnon.)

A No.

Q Nor have you taken their testimony?

A They got their testimony all down somewhere.

THE COURT: There was a term used here that I don't understand. You said the quartermaster would sound the bilges.

A He sounds the bilges every hour.

Q What is sounding the bilges?

A That is to find out the depth of the water in your hold. We have three holds on the "Newport", a forward hold, amidship and aft, and there is a pipe that goes from the main deck down to the bottom of the ship in which he sounds to find out how much water there is in the ship.

Q BY MR. DORR: When you first went down below you went to your cabin?

A Yes, sir.

Q Then you went to the lavatory?

A Yes sir.

Q That is on the port side?

A No, on the starboard side.

Q On the main deck?

A On the main deck.

Q You were in the lavatory there?

A Yes.

Q When you heard the "Svea" whistle?

A I heard the two whistles and I got up and looked out the port and saw this ship coming right for me.

Q What whistle did you hear?

A I think it was two I heard.

Q A shrill tone like a schooner or gasoline launch?

A Not like a schooner, like a gasoline launch.

(Testimony of George McKinnon.)

Q A shrill whistle?

A It was not toot-toot; it was too-oo-oo.

Q The tone of the whistle was shrill like a gasoline launch?

A Yes.

Q That two-blast signal was the only thing you heard?

A Yes, sir.

Q Was the window of the lavatory open?

A Yes.

Q The port hole was open?

A Yes.

Q You heard this shrill whistle?

A Yes.

Q That is all you heard?

A That is all I heard.

Q And you looked and saw the "Svea" about 600 feet away?

A Yes, sir.

Q Then what did you do?

A I got up on the bridge right away.

Q Were the engines stopped then?

A The engines were going full speed astern.

Q Did your man on the bridge say he didn't hear the "Svea"?

A He said he didn't see them or hear them signal. There was a lot of passengers on the ship and nobody heard the whistle.

Q The "Newport" did not blow any whistles at all?

A No, we did not. I was the only one that heard those whistles.

(Testimony of George McKinnon.)

Q Nobody else heard them?

A No.

Q None of the passengers?

A No.

Q Never heard the "Svea" at all?

A No.

Q Now, you have referred to turning your ship in a circumference of only three-quarters to two miles.

A Oh, yes.

Q Did you have a hand or steam steering gear on the "Newport"?

A Steam steering gear.

Q You can put that over very rapidly, can you not?

A Very quickly.

Q Captain, from the time that you start to put your wheel over, how long does it take the ship to begin to change her course?

A 5 or 10 seconds.

Q For instance, Captain, if you had a buoy, or some object ahead of you, in front of you, and you wanted to swing, going at 9 knots, to clear that, you could swing the vessel very quickly?

A Very quickly.

Q You say it would only take 5 or 10 seconds?

A It would take about 18 seconds to go from one point to the other. In 2 minutes she will make about 4 points.

Q Now, at the rate of 9 knots an hour your vessel would travel about 900 feet a minute, would she not?

A About that.

Q She would go a mile in six and two-thirds minutes?

A Yes, she would go about that.

(Testimony of George McKinnon.)

Q She would go about 900 feet a minute, so that by the time that you had gone a ship length, from the time you put your wheel over your vessel would start to swing?

A Yes. We didn't put any wheel over. There was no wheel to put over.

Q I am saying at the time of the collision when you were going 9 knots, and you put your wheel over, before the vessel had gone a ship's length she would start to swing over?

A Yes.

Q She is a very handy ship?

A Yes.

Q Steers easily?

A Yes.

Q Turns easily?

A Yes, sir.

Q Wasn't she what was known as a good handling ship?

A Yes, sir; we call her an easily handling ship, a handy ship to handle.

Q Before you had gone a ship length she would start to turn?

A Yes.

MR. DORR: I think that is all.

REDIRECT EXAMINATION

BY MR. MACKEY:

Q When the third mate stands his watch, if he is standing properly as he should upon the bridge or close to the bridge—

A Upon the bridge.

(Testimony of George McKinnon.)

Q Can he be seen from other ships if he is on watch at the proper place?

A Oh, yes, you can see all around everywhere.

Q If the third officer had been on the bridge would it have been at a place where those on the "Svea" could have seen him if they had put up their glasses on him?

A Yes, it could be done with the naked eye.

Q You had a chart house in the immediate neighborhood?

A Right on the bridge.

Q You keep a chart on the table there?

A Yes.

Q That was your navigating chart?

A Yes, sir.

Q At the time you changed your course just before the collision, were you heading true?

A I was keeping her in a little so I would get a good departure from Lion Rock.

Q In case the officer on watch wanted to consult the chart for a moment while he was navigating the ship, could he step in the start house and then back on the bridge?

A Oh, yes.

Q There is no reason why he could not do that?

A No.

Q It would not require more than half a minute?

A He steps right off the bridge into the chart house.

Q He could still do that and be on duty there?

A Yes.

Q While he was doing that the man below would still continue the ship on its course?

(Testimony of George McKinnon.)

A We do that all the time. There is windows in the forward part of the chart house and he could see out.

Q He could keep a lookout from the chart house?

A There is a window on this side and a window on that side and there is two lights in the forward end, and you could see all around.

Q So that a man walking up and down on watch could still go in the chart house and could still be navigating the ship?

A Yes.

Q The "Newport" is a normal handling ship?

A Yes.

Q Does she turn more rapidly than an ordinary ship?

A No, she turns very handy. We call her an easy handling ship.

Q More rapidly than an ordinary ship of her size, or not?

A She would turn as an ordinary ship of her size.

MR. MACKEY: That is all.

Q BY THE COURT: Captain, what is the condition of the passage from a point up at the left hand side of the map there, the first point where the "Svea" was up to the point of the collision? Is it safe passage in towards the shore?

A I don't understand what you mean.

MR. MACKEY: I think I might clear that up, your Honor.

Q BY MR. MACKEY: How far off shore were you, Captain?

A 12 miles off shore.

Q Any rocks or shoals around there?

(Testimony of C. A. Heygendorff.)

A Nothing around there.

Q Any ships there?

A No ship in sight at all.

Q Just the "Newport" and the "Svea"?

A That's all, just the "Newport" and the "Svea".

MR. MACKEY: That is all.

MR. DORR: That is all.

C. A. HEYGENDORFF,

called as a witness on behalf of the respondents, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MACKEY:

Q What is your occupation?

A Pilot, employed by the Harbor Department, City of Los Angeles.

Q How long have you been going to sea?

A 25 years.

Q What papers do you hold?

A Unlimited master's papers, and pilot papers for San Diego, San Pedro, San Francisco, Columbia River, Astoria, and all of the Puget Sound, Tacoma and Seattle.

MR. MACKEY: Any question as to his qualifications as a master mariner?

MR. DORR: No, there is not.

Q BY MR. MACKEY: Do you know the Steamer "Svea"?

A Yes, sir; I have seen her.

Q Do you know the Steamer "Newport"?

A Yes, sir.

Q The evidence in this case shows that the Steamer "Svea" was proceeding on a course northwest by north

(Testimony of C. A. Heygendorff.)

one-half north, and the Steamer "Newport" was proceeding on a course east by south, and while so proceeding the Steamer "Svea" saw the Steamer "Newport 8 miles distant, bearing about 3 points on her port bow, and when the vessels were about 2 miles apart the Steamer "Svea" blew one blast on her whistle and received no response from the "Newport"; when they were about 1 mile apart she blew four blasts on her whistle and received no response from the "Newport", and when they were a little more then three-eighths of a mile apart she gave four blasts on her whistle and received no response, during all of this time the bearing of the "Newport" remained practically the same; there were no other ships in the Pacific, and the vessels were 15 miles off shore, the weather was clear, wind was light, just a slight northwesterly swell; when the vessels were a mile to 2 miles apart the mate of the "Svea" looked on the bridge of the "Newport" with his glasses, and from time to time looked at the "Newport" with glasses and saw no sign of anyone on the bridge, neither the master nor the mate had seen anyone on the bridge of the "Newport" at any time; that the course and speed of the "Svea" was maintained throughout and apparently the course and speed of the "Newport"—apparently to those on the "Svea" the course and speed of the "Newport" was being maintained. Under those circumstances what would be your judgment as the proper course under the rules of good seamanship for the "Svea" to take?

MR. DORR: I object to that, as a matter of law, not a question of opinion of a witness.

(Testimony of C. A. Heygendorff.)

THE COURT: Objection overruled

A Shall I answer the question?

MR. MACKEY: Yes.

A In my opinion there was danger of a collision between the two vessels and I would followed either one of three courses; I would have put my helm hard aport or hard astarboard, or stopped my engine, or reversed the engine when I became suspicious that there was something wrong with the approaching vessel.

Q Under the circumstances as I gave them to you, was there anything in the situation which would have made an ordinarily prudent master suspicious?

A Yes, I think there was.

Q When would you have taken any action if you had been handling the "Svea"?

A Immediately after receiving no response to my second danger signal.

Mr. MACKEY: That is all.

CROSS EXAMINATION

BY MR. DORR:

Q You would take that action, Captain, when you became doubtful as to what the other vessel was going to do?

A If I thought there was risk of collision, yes.

Q Now, Captain, assuming that the "Newport" was coming down on this course and the "Svea" coming on this course (indicating).

MR. MACKEY: You are referring now to this chart respondents' Exhibit No. 2.

Q BY MR. DORR: Referring to the courses shown on respondents' Exhibit B, and supposing that the "Svea" was along in here, you would have taken some action?

(Testimony of C. A. Heygendorff.)

MR. MACKEY: "Along in here" does not mean anything. Where are you pointing?

MR. DORR: What was the distance you gave? I can not point out the exact distance on this chart. What was the distance you gave?

MR. MACKEY: When?

MR. DORR: The distance of the second danger whistle.

MR. MACKEY: The distance at the second danger whistle was when they were half a mile apart. Three-eights of a mile apart, I believe, according to the testimony, Mr. Dorr.

Q BY MR. DORR: Assuming at that time you became doubtful and thought that there was risk of a collision occurring, and at that time you started to port your helm, which would turn your ship's head to the left, to the port, would it not?

A Yes.

Q At the same time the "Newport" had starboarded her helm, as she was required to do under the law, both vessels would have turned out in that direction, what would have happened?

A That is very hard to tell from a diagram like that. I think the speed of the "Newport" being 9 knots and the speed of the "Svea" being 8 knots and the vessels being half a mile apart, that in all probabilities with the vessel of the type of the "Svea", and light, that they would have cleared. It is hard to say whether they would have hit. I believe, being a half a mile apart, they would have cleared.

(Testimony of C. A. Heygendorff.)

Q That would have been danger of a collision if they had both turned together?

A There would have been, yes.

Q In your answer in which you said you would have manuevered by putting your helm hard to port or hard to starboard or stopped and reversed your engines was based on the assumption that the "Newport" was going to hold her course?

A It looked like it up to that time.

Q You base your answer on what it looked like at that time, still if she changed her course and the "Newport" changed her course, there would have been a collision?

A With the vessels still half a mile apart other action could have been taken if there was any indication of the "Newport" making a change.

Q The "Newport" had a chance to starboard her helm and clear at that point?

A Yes, sir.

Q And easily have gone astern the "Svea" at a distance of half a mile?

A Yes, sir.

MR. DORR: That is all.

MR. MACKEY: Would there be more or less danger in changing your helm under those conditions after the second danger signal, or would you have proceeded on your course?

A I would have changed her course unless I thought there was the least danger in doing so.

Q Could you have stopped your engines without any danger to yourself, too?

(Testimony of C. A. Heygendorff.)

A Yes, sir.

Mr. MACKEY: That is all.

Q BY MR. DORR: If you had stopped your engines and the "Newport" at the same time had come to the left she would come right down to where the "Svea" was, wouldn't she?

A She might have come pretty close.

Q In other words, you would figure on stopping your engines because you thought the "Newport" would hold her course?

A Of course, I have no means of knowing within a few feet of where those vessels would have been. I am not in a position to say and I don't believe anybody is. However, if the vessels did collide, and the "Newport" came within, we will say, 100 feet of clearing the "Svea", had the "Svea" taken some action and swung in the other direction, or stopped her engines, in my opinion she would not have been in the position to be struck the moment she was struck.

Q That is based on the "Newport" holding her course?

A Yes.

Q Now, Captain, you are familiar with the rules that requires the privileged vessel to hold her course and speed?

A I am.

Q Do you think that when you saw a vessel on your port bow coming down and there is some doubt as to whether she is going to act or not, that you can speculate as to whether she is going to act and maneuver your vessel accordingly?

(Testimony of Fred Warner.)

A When I went to sea I always got away from that condition; I was nowhere near to it.

Q You always held your course and speed?

A Not always.

Q Did you speculate when you did not know what the other vessel was going to do and take some maneuver?

A I think I would have followed the unwritten law on this coast, which is very often done, and that is, go ahead, mule, and go astern of the steam schooner. That I think is controlling on this coast. To keep clear.

Q If the "Newport" had gone astern of the "Svea" you think it would have shown better judgment?

A Yes, it undoubtedly would have shown better judgment.

THE COURT Take a recess until 2:00 o'clock.

(A recess was here taken until 2:00 o'clock p. m.)

AFTERNOON SESSION.

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2 o'clock.

THE COURT: Proceed, gentlemen.

FRED WARNER,

called as a witness on behalf of the respondents, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MACKEY:

Q What is your occupation?

A Master mariner.

Q How long have you been a master mariner?

(Testimony of Fred Warner.)

A 27 years.

Q How long have you been going to sea?

A 42 years.

Q In what capacity are you engaged at present?

A Municipal pilot.

Q In the course of your experience have you had occasion to handle steam schooners?

A Yes.

Q Has that experience been limited or unlimited? How much have you done with steam schooners?

A Steam schooners, let's see, 7 or 8 years, I guess.

Q Captain, the evidence in this case shows the following situation: The Steamer "Svea"—do you know the Steamer "Svea"?

A Yes.

Q And the "Newport"?

A Yes, I know the "Newport".

Q The evidence shows that the Steamer "Svea" was proceeding on a course northwest by north one-half north, magnetic, and the Steamer "Newport" was proceeding on a course east by south, magnetic; it was a bright, clear day, visibility 12 to 15 miles, perhaps more, a light wind, light northwesterly wind, moderate swell, northwesterly swell; that the Steamer "Svea" had a speed of 7½ or 8 miles an hour, and the Steamer "Newport" had a speed of something between 9 and 10, 9 or 10; that the Steamer "Svea' 'sighted the Steamer "Newport" 8 miles distant, 3 points on her port bow; that when the two vessels were about 2 miles apart the Steamer "Svea" gave one blast on her whistle and received no response from the "Newport"; that when

(Testimony of Fred Warner.)

they were about a mile apart the Steamer "Svea" blew four blasts on her whistle and still no response from the "Newport"; that the Steamer "Svea" when the vessels were between three-eighths of a mile and half a mile apart gave a second four-blast danger signal and received no response from the "Newport"; that at no time did the officers on the "Svea" see any steam escaping from the whistle of the "Newport"; that the Steamer "Svea's" course and speed were maintained and that the bearing of the "Newport" did not change appreciably; that in the course of her progress towards the "Newport" the mate on the bridge of the "Svea' 'put his glasses on the "Newport" and did not see anybody on the bridge, either of the officers, the mate or the captain on the bridge of the "Newport"; that at no time did the "Newport" show any tendency to change her course, her speed, or reverse, or do anything to keep out of the way of the "Svea", so far as could be seen on the "Svea"; under those circumstances, as a master mariner, what would you say an ordinarily prudent navigator would do?

MR. DORR: At what point, Mr. Mackey?

Q BY MR. MACKEY: Under that state of facts, Captain, would there be any point along the course of the "Svea" at which you would judge an ordinarily prudent navigator would have altered the course or speed of the "Svea"?

A When he got within the three-eighths to half a mile?

Q Yes.

A Yes, getting that close, I would have stopped the ship, stopped the ship and backed her up.

(Testimony of Fred Warner.)

Q Why?

A Well, I would know at that close distance that he was not going to give me the right of way.

Q What would indicate to you that he was not going to give you the right of way?

A Well, I could tell by the ship that he was not going to give me the right of way, no ifs or ands about it, being that close and would not answer the signals, I would know he was not going to give me the right of way.

Q Would there be any danger to the "Svea" in stopping and reversing or backing, that close?

A No.

Q Why not?

A Well, when she backs she would back port pretty heavily at that close, whatever the "Newport" did, if she did anything, I know very well she would swing and would be pretty well in safety, if he ported his helm all the time, and her head would follow off to the starboard on a parallel line with the "Newport".

Q When you say the steam schooner would back portt, what do you mean?

A Her stern would swing to port.

Q That is, her stern would swing to the left?

A Yes, and her head would swing to the starboard.

Q When you say to the starboard you mean to the right?

A Yes.

MR. MACKEY: That is all.

(Testimony of Fred Warner.)

CROSS EXAMINATION

BY MR. DORR:

Q You say there would be no danger to the "Svea", no matter what the "Newport" did?

A Did I what?

Q I understood you to say there would be no danger to the "Svea" no matter what the "Newport" did.

A I would not figure there would be any danger.

Q In other words, whatever direction the "Newport" would turn, the "Svea" would be perfectly safe?

A Yes.

Q In other words, at that time there would be time for the "Newport" to change her course?

A My idea would be when I saw them getting that close, after all of those signals and he did not answer, I would know he was not going to give me the right of way.

Q Captain, have you been a master on steam schooners?

A Yes, sir.

Q What type of vessel?

A Engines aft.

Q About the same type as the "Svea"?

A Yes.

Q Running in and out of San Francisco?

A Yes, running in and out of this port and up north.

Q And San Pedro?

A Yes.

Q Haven't you found it a tendency on the part of these passenger ships to shave close at times?

(Testimony of Albert Winslow.)

MR. MACKEY: I object to that question as immaterial. What other passenger ships do is not material here.

MR. DORR: He never navigated the "Svea". He navigated other steam schooners.

THE COURT: I think it goes to the question of what ordinary prudence would indicate, as a general rule. Overruled.

Q BY MR. DORR: Haven't you found a tendency on the part of these passenger ships to shave close at times?

A No, my experience has been the other way.

Q You never noticed that?

A I haven't noticed that. My experience has been that it has been the other way.

Q You think you would have taken the action you mentioned when you were three-eighths to a half a mile away from the "Newport"?

A I know I would.

MR. DORR: That is all.

Q BY MR. MACKEY: Do you think an ordinarily prudent navigator would act as you say you would act?

A Absolutely.

MR. MACKEY: That is all.

ALBERT WINSLOW,

called as a witness on behalf of the respondents, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MACKEY:

Q What is your occupation?

(Testimony of Albert Winslow.)

A Master mariner.

Q How long have you been going to sea?

A Right onto 27 years.

Q Do you know the "Newport"?

A Yes sir.

Q Do you know the "Svea"?

A Yes, sir.

Q Captain, the evidence in this case shows the following: On the morning of November 29th, about 9:53, between 9:30 and 9:53, a bright, clear sunshiny day, visibility was between 12 and 15 miles, light northwesterly wind, light moderate swell, and that the Steamer "Svea" was proceeding on a course northwest by north one-half north, magnetic, speed 7½ to 8 miles an hour; that the Steamer "Newport" was proceeding on a course east by south, magnetic, speed 9 to 10 miles an hour; that the Steamer "Newport" was heavily loaded and the Steamer "Svea" was light loaded; her engines are aft; that her draft forward was 7½ and her draft aft was 14 feet; that when the vessels were 8 miles apart the "Svea" sighted the "Newport" bearing about 3 points on her port bow; that when the vessels were about 2 miles apart the "Svea" blew one blast on her whistle; that when they were about 1 mile apart she blew four blasts on her whistle; and that when they were between three-eighths of a mile and half a mile apart she blew another signal of four blasts on her whistle; that she received no reply from any of those signals from the "Newport", nor did she see any steam escape from the "Newport's whistle; that she kept her course and speed throughout; that the mate of the "Svea", who was

(Testimony of Albert Winslow.)

on her bridge, looked at the "Newport" as they proceeded along the course, and saw no one on the bridge of the "Newport", neither the mate nor master, and with the naked eye saw nobody on the bridge of the "Newport" at the time of the collision; that the bearing of the "Newport" remained the same all the time; that at no time did it appear to those on the bridge of the "Svea" that there was any change of course or change of speed on the part of the "Newport"; that she appeared so far as they could see to be going along the same during the entire time; that the "Newport" was in sight of those on the "Svea" from the period of 9:20 until 9:53, at the time of the collision. State whether in your opinion under those curcumstances there would be any time or any place along the line of the "Svea's" course when an ordinarily prudent navigator would have deemed it good seamanship to have changed the course or speed of the "Svea"?

A Shall I answer now?

Q Yes.

A Well, surely after he blew—

MR. DORR: You can answer that yes or no.

Q BY MR. MACKEY: Answer that yes or no. I have asked you whether there was any time or place when an ordinarily prudent navigator on the "Svea" would have deemed it good seamanship to have changed her course or speed. What would an ordinarily prudent navigator have done, and when?

A Well, there is a little rhyme that goes with that, your Honor. When I was a little boy I learned a little rhyme pertaining to that. "To act as judgment says is proper, to port or starboard, back or stop her."

(Testimony of Albert Winslow.)

Q What would you have done, and where?

A I might have run a little more after he blew his first whistle and before I got the danger signal, but there would be no time that I would run my ship into danger.

Q When would you consider it necessary to change either your course or your speed?

A Any time after I gave the danger signal; as soon as he did not answer my passing signal I would give him the danger signal and I would know there was something the matter aboard that ship.

Q You say you have been going to sea 27 years?

A No, onto 27 years.

Q You learned that rhyme when you started in?

A As a boy, yes.

Q At that time the rules of the road required two vessels approaching each other to both stop, slacken, and reverse, did they not?

A I don't think there was any change in the rules of the road from the time I was 14 years old up to the present time.

Q Were you 14 years old before 1897?

A I was born in 1883, the 2nd of September.

Q You would have been 14 in 1897?

A I say I was born in 1883, the 2nd of September, and I am going on 41 years of age now.

Q At any event, you know of no change in the rules of the road?

A I don't think there has been any.

Q Your idea is that you would have changed your course at the time of that first danger signal, which was blown there, and the vessels were more than a mile apart?

(Testimony of John O. Blanchfield.)

A Not necessarily so. I might have run a little more. As I said before, I would never let my ship get in danger with the other ship.

Q If you thought there was any possibility that the other vessel was not going to live up to the rules of the road, what would you do?

A I would not take any chances on what the other man would do at any time.

Q The rules require you to hold your course and speed?

A Yes; it also says to eliminate collisions at all times.

Q You can not figure on that without figuring on what the other ship was going to do?

A I never figure on what the other fellow is going to do. I know what I am going to do at all times.

Q What is your present occupation?

A At present I am working as a stevedore.

Q You are not going to sea now?

A No.

Q What were you captain of last?

A I was captain of the Steamer "Yale", but lost the captaincy on it.

MR. DORR: That is all.

JOHN O. BLANCHFIELD,

called as a witness on behalf of the respondents, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MACKEY:

Q Captain, what is your occupation?

A Master mariner.

(Testimony of John O. Blanchfield.)

Q Did you hear the state of facts as I stated them to Captain Winslow?

A I did.

Q Under the circumstances as I stated them to Captain Winslow, would there be any place or time along the course of the "Svea" when in your judgment an ordinarily prudent navigator would have stopped or reversed or taken some action on her part to have avoided a collision?

A Absolutely.

Q When and where would that action ordinarily be taken by a prudent navigator?

A I would have stopped my ship before I blew the second danger signal if I saw no indication of life on the "Newport's" bridge.

Q Why would you have done that?

A After looking at the "Newport" with my glasses and not noticing any sign of life I would have come to the conclusion that she was not going to change her course, and to save my ship from going into any danger I would have stopped the ship and found out what the other fellow was going to do, and not make any more headway. That would have given him a chance to clear and keep going.

MR. MACKEY: Cross examine.

CROSS EXAMINATION

BY MR. DORR:

Q Are you familiar with the construction of the "Newport", Captain?

A Yes, sir.

Q Have you ever been on her bridge?

(Testimony of John O. Blanchfield.)

A No, I have not.

Q Are you a pilot?

A I have a pilot's license in San Francisco.

Q By what company are you employed?

A None.

Q What was the last company?

A Luther J. Olson.

Q Captain, the time that you referred to as stating you would have stopped your vessel after the first danger signal. That was when the vessels were a considerable distance apart?

A I would have known by the evidence. The mate said that he didn't see any life on the "Newport's" bridge, and I would have known that there would be something wrong on that vessel.

Q Captain, at that distance of a mile apart would it have been possible for the "Newport" to have starboarded her wheel hard over to swing around and miss the "Svea"?

A Yes.

Q At a mile and even closer?

A Even closer, yes.

MR. DORR: That is all.

REDIRECT EXAMINATION

BY MR. MACKEY:

Q Would there have been any danger to the "Svea" taking any course you suggested?

A No danger at all. If he stopped he would have his vessel under control. He could go ahead or back or anything as long as he had his headway off the vessel.

(Testimony of John O. Blanchfield.)

Q I don't know whether I understood you correctly or whether Mr. Dorr did. His last question indicated that he understood you had testified that you would have taken your action immediately when the first danger signal was blown.

A That would depend upon the distance I was away from the other vessel.

Q Assuming the distance as I have stated in the statement of facts to Captain Winslow, as being a mile, would you have taken your action at that time or would you have waited?

A I would have waited until I got a little closer and probably have given them another danger signal.

Q Would there have been any hesitation on your part after you had given the second danger signal?

A No hesitation at all.

RECROSS EXAMINATION

BY MR. DORR:

Q You didn't see anything wrong with the navigation of the "Svea" until after the second danger signal?

A She used very poor judgment, very poor seamanship.

Q You would have stood exactly as he did up until the time she blew the second danger signal?

A I would have.

MR. DORR: That is all.

MR. MACKEY: That is our case.

MR. DORR: We have no rebuttal.

THE COURT: Now, gentlemen, I don't care for any argument on the facts, unless there are some decisions to be cited.

(Argument of counsel omitted.)

THE COURT: The case will be submitted.

Filed May 1, 1926. Chas. N. Williams, clerk, by L. J. Cordes, deputy clerk.

[Title of Court and Cause.]

BE IT REMEMBERED: That on Friday, December 22, 1922, pursuant to stipulation of counsel hereunto annexed, at the offices of Messrs. ANDROS & HENGSTLER, in the Kohl Building, in the City and County of San Francisco, State of California, personally appeared before me, E. M. CLARK, a Notary Public in and for the City and County of San Francisco, State of California, authorized to administer oaths, etc., JOHN MC KEOWN, CHARLES S. SEMSEN, and KARL ROHBERG, witnesses called on behalf of the Libelant.

F. W. DORR, ESQ. appeared as proctor for the Libelant, and RUSSELL A. MACKEY, ESQ., representing Messrs. MC CUTCHEN, OLNEY, WILLARD, MANNON & GREENE, appeared as proctor for Respondents, and the said witnesses having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the cause aforesaid, did thereupon depose and say as is hereinafter set forth.

(It is hereby stipulated and agreed by and between the proctors for the respective parties that the depositions of the above-named witnesses may be taken de bene esse on behalf of the Libelant at the offices of Messrs. ANDROS & HENGSTLER, in the Kohl

(Testimony of John McKeown.)

Building, in the City and County of San Francisco, State of California, on Friday, December 22, 1922, before E. M. CLARK, a Notary Public in and for the City and County of San Francisco, State of California, and in shorthand by CHARLES R. GAGAN.

(It is further stipulated that the deposition, when written up, may be read in evidence by either party on the trial of the cause; that all questions as to the notice of the time and place of taking the same are waived, and that all objections as to materiality, relevancy and competency of the testimony are reserved to all parties.

(It is further stipulated that the reading over of the testimony to the witnesses and the signing thereof are hereby expressly waived.)

(Title of Court and Cause.)

JOHN MC KEOWN,

Called for the Libelant; Sworn.

MR. DORR: Q. Mr. McKeown, you are employed by the Pacific Mail Steamship Company, are you? A. Yes.

Q. On board the steamship "Newport"? A. Yes.

Q. As third officer on the steamship "Newport"? A. Yes.

Q. You were so employed on the 29th of November, 1922? A. Yes.

Q. What time on November 29th did you go on watch? A. 8 a. m.

Q. Did you remain on watch until 12 m? A. Yes.

(Testimony of John McKeown.)

Q. What were the weather conditions during your watch?

A. Fine and clear.

Q. How far could you see? A. Approximately 10 miles.

Q. How far off-shore were you? A. We were about 13 miles off-shore.

Q. Could you see the land? A. No, you could see the loom of it.

Q. Did you see the steam schooner "Svea" during your watch?

A. Yes.

Q. At what time did you first see her? A. Approximately 9:45.

Q. How far off was the "Svea" when you first saw her?

A. She was about a mile.

Q. What was the bearing of the "Svea" from your ship when you first saw her? A. Four points on the bow.

Q. On which bow? A. On the starboard bow.

Q. From the time you first sighted the "Svea" thereafter until about 9:53 a. m., was she at all times on your starboard bow?

A. Yes.

MR. DORR: That is all.

MR. MACKEY: No cross-examination.

———x———

(Testimony of Charles S. Semsen.)

CHARLES S. SEMSEN,

Called for the Libelant; Sworn.

MR. DORR: Q. You hold a master's license, do you, Captain?

A. Yes.

Q. You were formerly mate on the steamer "Svea"? A. Yes.

Q. Were you mate on the "Svea" on November 29th, 1922? A. Yes.

Q. Where was the "Svea" bound on November 29, 1922?

A. Bound to San Francisco from Ventura.

Q. Were you on watch on the morning of November 29, 1922?

A. Yes, from 8 until 12.

Q. You went on watch at 8 o'clock in the morning? A. Yes.

Q. Where was the "Svea" at that time? A. She was just about abreast of Point Buchon, about twelve miles north of Point Los Angeles—Port Harford.

Q. About how far off-shore? A. About 12 miles.

Q. When you went on watch at 8 o'clock in the morning, what course were you steering? A. Steering northwest.

Q. Magnetic? A. Yes; that was the course by the pilot house compass, it is the same thing.

Q. You say that was your course by the pilot house compass? A. Yes.

Q. How long did you continue on that course? A. We changed the course at 9:15.

(Testimony of Charles S. Semsen.)

Q. What was your course after that? A. Northwest by north, half north.

MR. MACKEY: Q. Is that magnetic, or pilot house? A. That is pilot house. We always steer magnetic courses.

MR. DORR: Q. How much deviation did you have? A. There was no deviation on that heading, it was practically a magnetic course.

Q. No deviation on that heading? A. No.

Q. How long did you continue on that course? A. Right along up to the accident.

Q. What time was that? A. It was 9:53, I think it was.

Q. By the accident, are you referring to a collision with the steamship "Newport"? A. The accident we had with the "Newport", yes.

Q Captain, how was the weather on the morning of November 29? A. It was a nice, clear morning.

Q. No haze of any kind? A. No, it was good weather.

Q. Sun shining? A. The sun was shining that morning fine.

Q. How far could you see? A. I could see the land plain all over; I could see about 15 miles anyway.

Q. You could see at least 15 miles? A. Yes.

Q. Was there any wind? A. A little wind from westward, northwestward.

Q. Was there any swell? A. Yes, a westerly swell; quite a swell on.

Q. What was the purpose of changing the course? A. Getting in under the land, I suppose. The captain

(Testimony of Charles S. Semsen.)

changed the course himself. We generally hug the land to get out of the seaway and wind.

Q. Where would your course take you, about what point on the land? A. It would take us in a little to the southward, I should think, of the Piedras Blancas Light.

Q. What time did you first sight the steamer "Newport", according to your best recollection? A. I seen her for quite a while; I could not exactly remember the time.

Q. And how far off was she? A. She was about five or six miles.

Q. You saw the Newport five or six miles off? A. Yes.

Q. How did she bear from your vessel? A. She was about three points on our port bow, perhaps a little more. I did not take any bearing of her.

Q. Was anyone else on the bridge besides yourself.

A. The Captain was there.

Q. Could you see her plain at that time? A. Oh, yes, you could see her plain.

Q. From that time on to the time of the collision was the "Newport" always on your port bow? A. Yes.

Q. What change, if any, did you make in your course? A. We did not change any.

Q. Did you change your speed? A. No, sir.

Q. What speed was the "Svea" making? A. I should think about 8 miles at that time.

Q. Was she light? A. Empty.

Q. Did you make any signals on your whistle? A. We blowed one whistle when she was close to us, very close.

(Testimony of Charles S. Semsen.)

Q. How far away were you when you blew one whistle? A. About two miles.

Q. Was there any answer from the "Newport"? A. No, sir.

Q. What did you do after that? A. We kept our course and kept our speed. Later on we blowed four whistles, four short whistles.

Q. You mean on your vessel? A. Yes.

Q. What kind of a whistle did the "Svea" have? A. She had a good whistle, a very good, strong whistle.

Q. Have you any idea how far it could be heard on a morning of that kind? A. You could hear it easy four or five miles—five miles. She had a very good, strong whistle, a very coarse whistle.

Q. How far away were you when you blew four whistles? A. Perhaps a mile off. He did not notice our first whistle, and we waited a while, and then we blew several small whistles, the captain did, so as to draw his attention. There was no answer to that, either.

Q. The captain blew the whistles, did he? A. Yes.

Q. After you blew the four short blasts, then what did you do? A. We waited a while, expecting him to take action; he was closing in on us and we blew four more when he was close in.

Q. How far away were you from the "Newport" when you blew the last four blasts? A. You mean the second four?

Q. Yes. A. We were about a shiplength off.

Q. Then what did you do? A. We couldn't do nothing except keep our course full speed ahead. I said just a few seconds before, I says to the old man,

(Testimony of Charles S. Semsen.)

"There is a collision here, you had better port." He says, "I know there is, we can't get out of it now." So I says, "Port a little bit," but our vessel didn't have any time to swing.

Q. You mean you said to the man at the wheel to port the helm? A. Yes; I hardly had a chance to speak much before he was right on top of us. We tried to avoid a head-on collision, we were trying to swing so as to get a glancing blow in order to save ourselves.

Q. At the time you gave the command to port, was there any possibility of avoiding the collision? A. Oh, no, we couldn't get out of it then.

Q. Where did the "Newport" strike the "Svea"? A. About two beams beyond the hatch, that is, about midships.

Q. On which side? A. Port side.

Q. Near the main rigging? A. About 15 feet forward of the main rigging, I should judge, just about 15 feet; I didn't measure it.

Q. What damage, if any, was done to the "Svea" when the "Newport" struck her? A. She came right head in, she went through the rails and bulwarks.

Q. Did she cut through the side of the ship? A. Yes, she cut through so far as I could see. I looked over and she did, as far as I could see.

Q. Above and below the water line? A. Yes, above and below the water line. I put a rope around myself and went and looked to see what we could do to stop the water from pouring into her.

Q. After the "Newport" struck you, then what happened? A. She backed out of the hole. Of course,

(Testimony of Charles S. Semsen.)

her engine was stopped. I stopped her just as she hit us. I stopped her engine just as soon as he struck us. Then after he backed out I gave a kick ahead then, because he swung alongside of us like this and hit us a couple of times.

Q. You mean both vessels were pointing in the same direction? A. Yes, both vessels pointing in the same direction. We were under his bow then and he was kind of jumping on us, and I gave her a kick ahead then so as to get clear of him.

Q. You stated that you stopped the engines just as she struck? A. Just as she struck, yes.

Q. Did you operate the telegraph yourself? A. I did at that time, yes.

Q. On the bridge? A. Yes.

Q. Was there any change in the speed of the "Svea" prior to that time? A. No, sir.

Q. How long did the engines of the "Svea" remain stopped then? A. As soon as he backed out, and, as I say, as he done so he hit us a couple of times on the side, and so I gave her a kick ahead; that must have been perhaps five or six minutes.

Q. Did you remain on the bridge? A. Yes, I was on the bridge at that time right along.

Q. Did you remain on the bridge after that? A. I stayed there until we got away from him, yes.

Q. Were there any words exchanged between the "Svea" and the "Newport"? A. No, sir, except the only word I heard, they hollered from the "Newport" to stay by them. That is all the word I heard said.

Q. Who hollered? A. Someone, I couldn't say who it was.

(Testimony of Charles S. Semsen.)

Q. Did they ask you whether or not you were damaged? A. No, I didn't hear anything.

Q. What did you do after the "Newport" got free of you? A. We tried to follow; we started off, and we tried to follow him. Of course, he was going too fast for us, and we couldn't. He was heading in for the land then, too—I mean the "Newport" was. I passed the remark, "I guess she is trying to make Port Harford." I said that to the captain. I said, "That is the place we ought to make if we can." He went so fast, and then I seen him swinging to the southward.

Q. Away from the shore? A. Along the shore, going southward.

Q. Towards Arguello? A. Yes, towards Point Arguello. We blew several whistles after him.

Q. What whistle signals did you make after that? A. Several short-blast whistles.

Q. What did you do that for? A. I don't know. The old man did that. We set the flag in the main rigging. We set the N. C. flag.

Q. What does "N. C." mean? A. That is the distress flag.

Q. Is that the International distress signal? A. Yes, with the flag square above the ball; there is a round ball in that flag.

Q. How far away was the "Newport" when you blew your several blasts of the whistle? A. She could not have been more than two or three miles. He was going all the time away from us while we were whistling.

Q. Did she pay any attention to your whistle signals? A. No, sir, I never heard one whistle from that boat.

(Testimony of Charles S. Semsen.)

Q. Then what did you do after that? A. The engineer came and reported she was making so much water, it was gaining on him, with all the pumps going. I ordered a man to the hand pump to help them out. We steered straight in for the land, and tried to make land. There was nothing in sight, outside of the "Newport" —well, I saw the mast of one vessel away out. We had no wireless or anything to report anything, except flags. That is all we had—flags.

Q. How long did you continue in toward the land? A. I think it was until about a quarter after eleven we got to within a mile and a half of land.

Q. Were you still working your engines then? A. At last they were not working the engines. They were floating then. We were going along with the sea.

Q. Were your fires out? A. They fires were out.

Q. Were you taking much water? A. She was about full of water then.

Q. Then what did you do? A. Then we got to anchorage. We got 19 fathoms of water and we anchored.

Q. What did you do after that? A. We put one boat out, after we got in there. We kept steam on the donkey boiler with a little fire-wood, she couldn't use any oil because we had no way of getting the oil. We put one boat overboard and the second mate and three men went ashore to communicate. He had to walk eight miles from where we were laying in to Port Harford. He went to Mr. Sullivan, the agent for the Pacific Coast Company. He got a telephone there. They sent three launches out to help us and stay by us.

(Testimony of Charles S. Semsen.)

Q. How long did you stay in the ship? A. I stayed by her until she turned over.

Q. When was that? A. It was half past eight when we went in the boats, about that time; I didn't look at my watch, but it was about that time. I was sitting there in the boat. She was laying over this way. At a quarter past eleven she fell right over, with her mast and rigging in the water.

Q. That was 11:15 p. m. on the same day? A. Yes. We had two launches with us then. The second mate and myself and the chief engineer were in the boat.

Q. And the captain? A. The captain went ashore with one of the launches. Mr. Sullivan tried to get some tools, and to get another chain, and so on. That was about half past eight. The captain came back about twelve o'clock.

Q. And after she turned over you went ashore? A. Yes, she was lying on the side, there, with her rigging and everything in the water. The next morning the captain went out there and found her bottom-up.

MR. DORR: That is all.

CROSS EXAMINATION

MR. MACKEY: Q. How long have you been going to sea, Mr. Semsen? A. Since I was 14 years old.

Q. How long have you been on the "Svea"? A. Four months, or a little over. I think I joined her on the 11th of July.

MR. DORR: Let the record show that the libelant at this time produces the log-book of the steamer "Svea".

MR. MACKEY: The deck log-book.

MR. DORR: Q. That is the only one you keep, isn't it? A. That is the only one, yes, sir.

(Testimony of Charles S. Semsen.)

MR. MACKEY: Q. Do you keep a deviation book on board the ship? A. No, she had only a deviation card. There was very little deviation in the compass.

Q. How do you know there was very little deviation in the compass? A. Because we took our courses according to the standard compass. We always took standard compass.

Q. You pilot most of the time, don't you, by a point along the coast? A. Yes.

Q. How long had it been since you swung ship? A. Well, she had not swung ship since I came on board of her.

Q She was practically magnetic throughout the whole compass? A. Oh, no, there may be a little variation, a couple of degrees or so.

Q. How much deviation do you suppose there would be on her northwest course? A. I don't think there was more than one degree; that is about all.

Q. Easterly or westerly? A. As far as I know, I think there was an easterly deviation.

Q. And this course, northwest by north, half north, how much deviation would there be on that course? A. Not any, I don't believe, so far as I know.

Q. Do you know whether or not there was any? A. No, I can't remember that.

Q. Have you any records that show whether there was any deviation on that course? A. No; the log-book shows nothing there.

Q. I don't see anything here on deviation. A. Sometimes we took standards. You might find it in some other place.

(Testimony of Charles S. Semsen.)

Q. You do not know, as a matter of fact, whether there is any deviation on that course? A. I don't suppose it could be much, any way.

Q. What color is the "Svea"? A. She was black painted.

Q. All over? A. Her outside is black, and white houses.

Q. Black to the water-line, is she? A. Yes.

Q. When was she painted? Has she been painted since you were on her? A. No, sir.

Q. Not painted since you were on her? A. No, sir.

Q. What was her draft at the time of the collision, if you know? A. When she was light?

Q. Yes. A. She draws about 16 feet aft.

Q. How much forward? A. She draws about nine, I guess.

Q. What would be the distance from, say, the top of her rail at the forecastle head to the water, when light? A. I should think about 20 feet.

Q. Then where the forecastle head breaks, you have a space off the rail, there, that is not so far above the water, do you not? A. Well, is is about 8 feet, I guess, where the break of the forecastle head is.

Q. The forecastle head is about 8 feet above the main deck? A. Yes, about that.

Q. And that would put the main deck about 12 feet above the water? A. About 12 feet above the water; that is, away forward.

Q. And as you go aft she gets closer to the water? A. Yes, she tapers down, slopes down.

Q. You have two masts? A. Yes.

(Testimony of Charles S. Semsen.)

Q. And the deck-house is all aft? A. Yes.

Q. What is the maximum speed of which the "Svea" is capable? A. We have had her up to over 9.

Q. There was quite a swell at the time of this collision, was there not, quite a ground swell? A. Yes, quite a little swell.

Q. Were you pitching quite a bit, or were you rolling? A. We were rolling some. She always rolls. She rolls as if she were in dry-dock.

Q. She is pretty unsteady? A. Yes.

Q. As you proceeded on the course northwest by north, half north, was the swell hitting you on the port quarter, or was it hitting you right abeam, or right ahead? A. That ought to be two points forward of the beam, in a northwesterly sea. That is an angle of six points.

Q. So she would be hitting you on the port bow? A. Yes.

Q. That would give you a kind of a corkscrew motion as you went over the swell, wouldn't it? A. Yes, it seemed worse than a corkscrew motion sometimes—there is no question about that.

Q. You saw the "Newport" five or six miles away? A. Yes.

Q. And she was at that time on your port hand? A. Port bow, yes.

Q. You saw her clearly, did you? A. Yes, I saw her clearly.

Q. Could you make out her name at that time through the glasses? A. I didn't look at her the first time through the glasses.

(Testimony of Charles S. Semsen.)

Q. She bore at that time about three points on your bow? A. About that.

Q. And that bearing stayed the same throughout, practically? A. Not much changing. She was practically coming in the same direction.

Q. And when you were about two miles away, you blew one blast on your whistle? A. Yes.

Q. You knew that if you kept on that course and that if she kept on her course there would be a collision, didn't you? A, Oh, no, that I would not know.

Q. You knew there had been no changing in the bearing? A. Well, very little, but I didn't know whether there would be a collision.

Q. I mean that at that time you knew from the fact that there had been no change of bearing that if one or the other of you did not give way that there would be a collision, did you not? A. Well, he was to give way, because we had the right of way.

Q. Just answer the question. You knew that the bearing had not changed, didn't you? A. Not very much, no.

Q. And when the bearing does not change, that means that if the vessels don't alter their course or speed—one of them, at least, they are coming together, does it not? A. Well, according to the position they are in, yes.

Q. It does not make any difference about the position, if their bearing stays the same they are going to come together, unless the bearing changes? A. If they are headed toward each other, yes.

(Testimony of Charles S. Semsen.)

Q. If you see a vessel on one of your bows and her bearing stays the same, does that not mean to you that if one of you does not change either course or speed, that you are going to collide? A. Yes, but it is just according—we may collide, but at the same time if I have a right of way, I am supposed to keep to my right of way.

Q But if the bearing does not change, it means you are going to come together, unless one or the other gives way: That is true, isn't it? A. I suppose that would be true.

Q. Don't you know that that is the fact? A. Well, we must come together.

Q. Unless the bearing is changed, you will come together, unless somebody changes the course or speed? A. We didn't change ours.

Q. That is the fact, isn't it? A. Yes, we didn't change ours.

Q. I don't contend that you changed yours. I just want to get you clear on that point. When you were about a mile apart you blew four blasts? A. Yes.

Q. What was the reason for blowing four blasts? A. The captain blew four blasts to draw his attention; he did not answer our first whistle.

Q. When was it you put the glasses on the "Newport"? A. That was before that, before he blew the one whistle.

Q. You didn't see any activity on her at all, did you? A. No.

Q. She gave no evidence of changing her course? A. I could not say that. She may swing a point or

(Testimony of Charles S. Semsen.)

so, but sometimes you can't always realize that in so short a distance.

Q. Did you tell the captain she was not changing any? A. No, I didn't say that to the captain.

Q. Did you tell the captain her bearing had not changed any? A. We were standing there talking, and I was passing a remark about her, where she was bound for. I said, "She looks as if she is heading in to Port Harford." I used to run there myself, years ago, in Pacific Coast boats.

Q. That was before you found out that she was the "Newport"? A. I looked through my glasses later on, and I said, "That is the 'Newport', she don't run in there."

Q. You found that out before you blew the one whistle? A. Yes.

Q. And when you put your glasses on her, you saw no activity on the bridge at all? A. No, sir, I never did.

Q. Between the time you blew the one whistle and the time you blew the first four-blast signal, did you have your glasses on her from time to time? A. Not right along.

Q. Did you have your glasses on her from time to time during that interval? A. I don't remember if I did, or not, but I never saw anybody on the bridge.

Q. Did you look for anybody? A. Yes, I looked up there, and I passed the remark to the old man, "I don't see anybody on the bridge." I didn't know why they didn't answer the whistles.

(Testimony of Charles S. Semsen.)

Q. That was before you blew the first four blasts? A. Yes.

Q. You never say anybody? A. No.

Q. And you didn't hear any signals? A. No.

Q. And she didn't seem to be changing at all? A. Not to me.

Q. And her bearing seemed to be the same? A. I didn't take no bearing of her, but her position looked to be the same.

O. And you kept your course and speed? A. Yes.

Q. After the second four-blast signal, you were pretty close together, were you? A. Yes.

Q. How far apart? A. About a ship's length.

Q. On of your ship lengths, or one of hers? A. Say about 200 feet.

Q. About 200 feet? A. Something like that.

Q. You said before the Inspectors about 250 feet, didn't you? A. Well, maybe 250 feet; it is very hard to say the exact distance.

Q. It might be 300? A. It might be 300 for all of that.

Q. That was when you blew the second four-blast whistle? A. Yes.

Q. The four-blast signal was the ordinary danger signal that is sounded in case of danger? A. Yes.

Q. That is what is known as a danger signal? A. That is what it is supposed to be.

Q. And at no time did you see any activity on the bridge of the "Newport"? A. No, sir, I never did.

Q. She gave no indication of doing anything but holding her course and speed? A. That is all I could

(Testimony of Charles S. Semsen.)

see. She came along pretty fast. I could not say what they were doing there.

Q. You were on the bridge? A. Yes.

Q. And the captain was on the bridge? A. Yes.

Q. And you had a helmsman down below in the pilot house? A. Yes.

Q. Did you have anybody up on the fore-deck, at all? A. All hands were on deck.

Q. They were doing work around the deck, were they? A. They were cleaning up the ship that day. Most of them were all aft on the quarter-deck. They were cleaning up.

Q. Nobody else was on watch? A. The deck crew was on deck.

Q. You didn't have anybody on watch, on the top side, except yourself and the captain and the man at the wheel? A. Nobody else on the bridge. That is all we want, one man at the wheel. It was a nice, clear day. If it was a foggy day, we would have had a man on the lookout. But it was a nice, clear day. There was a man just cleaning up on the quarter-deck, there.

Q. And you say you were making about eight knots? A. Yes, about that; it may be a little bit more or less; it is hard to remember all those points.

Q. If you put your helm on the "Svea" hard to port, and going eight knots, how long will it take you to turn around? Do you know what your turning radius is? A. She will take quite a little swing sometimes, more or less, and it depends on the current, and on the headway.

(Testimony of Charles S. Semsen.)

Q. In still water. A. In still water sometimes she acts quick and other times slow.

Q. Say in still water. A. In still water she will take pretty nearly half a mile to swing around on one wheel.

Q. What do you mean by "one wheel?" A. With the wheel hard over.

Q. Do you think she will take that far? A. Sometimes she would, I think, except that you back her and help to throw her around the other way.

Q. If you are light, that means the forepart of your ship is well out of the water, doesn't it? A. Yes.

Q. She will turn pretty rapidly then, won't she? A. Not always. I have seen her helm bucking for half an hour trying to get around.

Q. Why? A. Because she wouldn't answer the wheel.

Q. Was that when you did not have any headway on? A. We had a little headway, too.

Q. She will spin pretty well around on her stern if there is not any current or wind to hold her back, won't she? A. I think she will, yes. She will go around in probably four or five shiplengths.

Q. Won't she go around in less than that? A. Not much; she makes quite a circle.

Q. The turning radius would be two ship lengths—the radius, itself. A. Well, maybe.

Q. If you are starting here and going around (indicating), the distance across the whole circle would be about four ship lengths? A. Pretty near.

Q. And the turning radius, itself would be about two ship lengths?

(Testimony of Charles S. Semsen.)

MR. DORR: Q. What is the length of that ship? A. I am not sure, but I think it is about 160 feet. I am not sure of that.

Q. 178. A. I know it is something like that—178. She will take three ship lengths, anyhow, to go around. That is 500 feet.

MR. MACKEY: Q. She will swing in about 500 feet? A. Yes, probably in that. She acts pretty good in doing that. She should act a little quicker when light, because she is not so heavy.

Q. With the wind on your port bow and the swell on your port bow, she would go around a little faster, wouldn't she? A. Not always. Sometimes the wind is just opposite. Sometimes the sea might hit her on the quarter and keep her bow up.

Q. But with the swell that you had out there that day, and what wind there was would be helping her, rather than holding her back? A. The wind was very light, it was not much to speak of. It was mostly seaway.

Q. Going at 8 knots, and putting your engines full astern, how far will the "Svea" travel before she comes to a stop? A. You may be able to stop her in about two lengths, or two and one-half; that has to be a pretty good favor, though.

Q. What do you mean by a good favor? A. Well, a good head sea, or something like that, just to dive into, like.

Q. As it was on that day of the collision, how far would you say? A. She may have stopped in two ship lengths, or two and one-half; it was not quite ahead, it was on the beam.

(Testimony of Charles S. Semsen.)

MR. DORR: Was that with the engines full astern —was that what you meant?

MR. MACKEY: Yes.

A. (Continuing) I never tried it, though. The captain could tell you more about how long that would take, because he has been with her a long time.

Q. Did you have any tarpaulin aboard the ship? A. Yes.

Q. Did you make any attempt to block up the hole through which the water was coming? A. Yes.

Q. What did you do? A. I got a tarpaulin and tried to get it over that hole.

Q. When did you do that? A. On the way going in there.

Q. Was that before or after you hoisted this distress flag that you spoke of? A. That was after we hoisted the flag.

Q. It was after you hoisted the flag? A. Yes.

Q. Was the hold full of water at that time? A. No, it was not full of water.

Q. How much water was there in it? A. It was about one-third full, perhaps—not quite that much.

Q. How far off the beach were you at that time? A. We were going toward the beach. The fires were out in the engine-room then.

Q. How far off the beach were you? A. When I got that tarpaulin?

Q. Yes. A. I tried to get the tarpaulin when we got in toward the beach, when we got fully in, right next to the beach.

(Testimony of Charles S. Semsen.)

Q. That was after your engines were stopped? A. Yes. We tried to cover it over.

Q. Was that after you dropped anchor? A. Yes, I think it was after we dropped the anchor—come to think of it now.

Q. How did you rig that tarpaulin? A. With ropes.

Q. Describe how it was done. A. We put a rope underneath the bow.

Q. You dipped your rope underneath the bow? A. Yes.

Q. Did you have one thickness of tarpaulin, or two? A. I had one thickness of a brand new tarpaulin, a tarpaulin I made myself on board.

Q. Did you ever get it down over the hole? A. I had it down over the hole, yes; how far down it was I could not say, but I know I got it pretty well down.

Q. How big a tarpaulin was it? A. It was the size of the hatch. I think it was about 28 feet long; I think it was 17 feet wide.

Q. And you put one thickness over the hole? A. Yes.

Q. All the water was coming in that one hole, wasn't it? A. That I could not say. It was coming through the skin on the inside, so far as I could say, and in different places. But that skin is always open more or less.

Q. If you had stopped up that one hole your pumps would have been able to keep the water out? A. That I could not say. I don't know how big a hole it was. I was trying to help keep it from going in.

Q. Was the tarpaulin painted, or not? A. We had one coat of this tarpaulin preparation on it.

(Testimony of Charles S. Semsen.)

Q. That makes it waterproof, does it? A. It is supposed to be waterproof, it helps.

Q. Did that stop the water from coming in? A. No, I don't think it stopped it very much. It kept gaining on us all the time.

Q. Did you see the water coming in the ship's side through this hole? A. Yes, you could see it pouring in through the skin.

Q. After you put the tarpaulin on, did it stop it any? A. The water came in just the same, as far as I could see. It gained so much then, it kept splashing up all the time.

Q. The hold was about one-third full when you put the tarpaulin over the hole? A. Yes, and over that, I guess.

Q. Why didn't you try to put that tarpaulin over it when you first hit? A. We tried to list her over with the water tanks; we emptied the fresh water tank out on that side. She was taking water then.

Q. Why didn't you try to put the tarpaulin over it first? A. The first thing we had to do was to get our boats ready, to get ready for the safety of the crew. We tried to follow up the "Newport". Before we knew it the water was gaining so fast that we had to look for our own safety.

Q. At first, you did not think there was any danger to yourselves? A. We kind of thought there was, because we saw the water pouring into the hold. We were down there looking. We had a man handling the pumps all the time, the hand pumps, to help along.

(Testimony of Charles S. Semsen.)

Q. When you dropped your anchor, the hole was not much more than a third full? A. Yes, I guess it was a little more.

Q. About how much more? A. It was over the keelson down there; I think that keelson is about five feet.

Q. How deep is the hold? A. 14 feet, I think.

Q. The keelson is 5 feet off the bottom of the hold? A. Just about my height, about five feet.

Q. How tall are you? A. I am 5 feet 7; it just about come to my eyes, and I can just about look over it.

Q. And the water was just over the top of that? A. Just about.

Q. That was at the time you dropped your anchor? A. I think that was about the time we dropped the anchor. I know there was lots of water in there when we dropped the anchor.

Q. How big was this distress flag that you say you put up, the N. C. flag? Is it a pennant? A. It is a universal flag. It is the regulation.

Q. Is it a pennant? A. It is two flags, N. C.

Q. Is the white flag a pennant? A. The white flag is a pennant.

Q. What is the other flag? A. Square.

Q. What color is it? A. Black and white. It is a square flag with the letter "N". It is just like a checker board.

Q. How big is the N. flag? A. I think the regulation is four feet; pretty near four-foot square, I think.

Q. Do you think it is that big? A. Pretty near that.

(Testimony of Charles S. Semsen.)

Q. And the white pennant? A. That is longer but narrower; about two feet.

Q. Two feet at the wide portion and then it tapers down to the end? A. Yes.

Q. Has it anything in it? A. A red ball.

Q. A red ball in the center? A. Yes.

Q. How far off the beach were you when you put those flags up? A. We were away out to sea.

Q. And the "Newport" was two or three miles away, was she? A. Yes, about that, about three miles, I guess, between two and three.

Q. I notice in this log-book you don't have anything at all about your course after the collision. A. We steered right straight in. We first tried to follow him, but he left us, and we headed right for the beach.

Q. And he headed right for the beach, first? A. Yes, as if he was going to Port Harford, and we were trying to follow him.

Q. When he headed for Port Harford, from where you were, he was almost headed toward the beach, wasn't he? A. Port Harford is a little to the southward. We anchored about eight miles north of Port Harford. The collision was about 12 miles. We anchored a little to the southward. When we got close to the shore we angled a little more, and then afterwards we had to make for the shore the best we could.

Q. How far away from him were you when you started to go in to the beach, too, I mean when you started to follow him? A. We started to follow him just as soon as we started up after the collision.

Q. What speed did you put your engines to? A. Full speed.

(Testimony of Charles S. Semsen.)

Q. Do you know that? A. Yes, as far as I know.

Q. Did you ring full speed on the telegraph? A. Yes, as far as I know.

Q. Right after the collision, and when he started ahead, you started ahead, too? A. I went down to look at the hold; the second mate was up there.

Q. Then you do not know, yourself, what was rung on the telegraph? A. We started full speed, I know, when I was up there, and we were going full speed when I came back up again.

Q. How far away was the "Newport" then? A. When we had the flags up she was about three miles ahead.

Q. Were you on the bridge when the flags were put up? A. I was down on the main deck when the second mate went up in the rigging with the flags.

Q. Did your ship head right for the "Newport", or did you parallel his course? A. We were just on the starboard bow.

Q. You were on about the same course as he was? A. Yes.

Q. Paralleling him? A. Yes, and then he turned.

Q. Then your courses were the same, and about three miles apart? A. Yes.

Q. Then he turned and went south? A. Yes.

Q. Then you turned and headed for San Luis Obispo? A. We headed in more for the land.

Q. That was a little northerly? A. Yes, a little north of Port Harford, headed right in for the beach. I think I took a bearing on Moro Rock. That is in the bay there. It is a big rock that looks like a haystack.

(Testimony of Charles S. Semsen.)

Q. How far apart were the two ships when you put your helm aport? A. Right close together, about a ship length.

Q. A ship length? A. Yes.

Q. You were a ship length apart when you blew your four blasts? A. I should say about 100 feet.

MR. DORR: Q. 100 feet when you put your helm over? A. Yes, about that.

Q. When you gave the command? A. Yes.

MR. MACKEY: Q. Did your helm go over immediately? A. It had to be hauled over by hand; we had no steam.

Q. Did you order it hard aport? A. Yes, I told him to put it hard aport.

Q. And this was a little bit after you had blown your four blasts? A. That was after we had blown the four blasts.

Q. Sometime after you blew the four blasts? A. Well, the vessels were about 100 feet apart.

Q. If you had put your helm hard a-starboard when you blew your four blasts, would you have cleared the "Newport"? A. No, sir.

Q. Why not? A. We would have been heading right into her just the same, but on a different degree.

Q. Wouldn't you have swung clear of her entirely? A. No, sir.

Q. If you had stopped your engines at the time you blew the four blasts, would you have cleared? A. Well, I don't know, I think not; I don't think we could have avoided it. If we had stopped her, I think there would have been a collision just the same if he had took his ordinary course.

Q. If you had slowed down when you blew the first four-blast signal, what would have happened? A. Well,

(Testimony of Charles S. Semsen.)

if the other man went where he ought to go, he would have gone right into us and we would have been blamed for everything.

Q. The ships were just about at right angles to each other when the collision occurred? A. Pretty near.

Q. They were just about at right angles? A. Yes, just about; he hit us right square amidships, head on.

MR. MACKEY: That is all.

REDIRECT EXAMINATION

MR. DORR: Q. How was your forecastle head painted? A. Our forecastle head is a gray color.

Q. Wasn't there some white trimming there, too? A. A little bit on the outside.

Q. And some white trimming on the after part of the poop? A. Around the forecastle head and down a little way is white.

Q. In regard to the painting on your ship, Captain, under the weather conditions as they existed on that morning how far away could the "Svea" have been seen? A. I should say ten miles, anyway.

Q. There was nothing about her painting that made her difficult to see? A. No, sir. We saw the steam schooner "Lindauer" in the evening, she came up to us at about half past five, and we saw her for about two hours before she came to us. We were watching her, trying to draw her attention to come along. We had our flag in the fore-rigging; I took them from the main rigging and shifted them up forward, so that she could see them, and so it would draw her attention to us.

Q. You made these entries in the log-book, did you? A. Yes, they are mostly all mine.

MR. DORR: The following are the entries in the log-book from 8 a. m. on November 29, 1922; it is stipulated that they may be copied into the deposition at this point:

PILOT HOUSE LOG BOOK

Steamship SVEA Voyage 361

Wednesday Date Nov. 29th 1922. Sailing from VENTURA to ABERDEEN

Time By Clock Hrs.	Min.	Name of Headland or Place	Pilot House Compass	Log Reading	Wind	Weather	Barom-eter		Ther-mom-eter	Re-Marks
8	00	Log Noted	NW	95½	NW	Cloudy	Mod	wsty	Swall	
9	15	Cc	NWxN½N	103½	Light NW	Clear	"	"	"	
9	53	(Coliginan) with " Steamer Newport. She left as (collision) Heading in for Sant Luis, all off are Pums going to cipe the water out								
10	45	A. M. Manned hand pump, water gaining								
11	40	" Engins stopt heading for the beatch fires out.								
11	45	" Let go Port anchor at 19 ftm. of water about 1 mile to Westward of Becho Rk.								
3	15	Pute No. 2 Boat out, weath 2nd Mate and 3 Seaman, went for assistance ashore, at 5:30 P. M. Steam Schooner G. C. Lindauer, came along and Stoad by us. the crew wash transferrd over to Steamer Lindauer for Safty. Except Captain Chife Engener and myselw Semsen 7.00 P. M. 2nd Mate Mr. Anderson. Returned weath 3 gaslin Lunchis to assista and Tow us to Port St Luis.								

(Testimony of Charles S. Semsen.)

RECROSS EXAMINATION

MR. MACKEY: Q. What direction was the wind, if any? A. A northwesterly wind.

Q. As you made for the beach, the wind was pretty well with you, was it not? A. Yes, we were heading in about east northeast, I guess; a little on the aft beam.

Q. There was hardly any wind at all? A. No; there was very little.

Q. The flags that you hoisted hung pretty well down, didn't they? A. Oh, yes, sometimes they were hanging down and sometimes they blowed out.

Q. It would be pretty difficult to see them at a distance of three miles, wouldn't it? A. When they blowed out you could easily see them at three miles.

Q. But if you didn't happen to catch them just as they blew out you would not know what it was, would you? A. Sometimes you can't make them out unless you are familiar with them.

Q. Most of the time you were going in there with the wind coming with you and the flags would hang down dead, wouldn't they? A. Sometimes they were.

Q. When you saw them they were hanging just about right straight down, weren't they? A. I seen them a couple of times—a few times—hanging down, and other times I saw them blowing out.

Q. They would just flap out and then hang down again? A. They had a tendency to do that; they were not all the time hanging down.

FURTHER REDIRECT EXAMINATION

MR. DORR: Q. At the time you put your helm over, or, rather, at the time you gave the command to

(Testimony of Karl Rohberg.)

the helmsman to put the wheel over, was there any possibility, then, of avoiding the collision? A. No, sir.

Q. I think you have already stated you did that to ease the blow? A. Yes, so as to get a slanting blow and not head on so much.

FURTHER RECROSS EXAMINATION

MR. MACKEY: Q. Does the "Svea" have a right turning screw? A. I don't know.

Q. When she backs, does she back to port or to starboard? A. She backs to port, generally.

Q. If you had backed your engine at the same time you put your helm over, it would help to swing her, would it not? A. I suppose it would.

Q. And it would also help to take the headway off her? A. I didn't have any right to do that—the master was there.

MR. DORR: Q. You are about to go to sea, are you? A. Yes, I am going to sail on the 26th of this month.

———x———

KARL ROHBERG,

Called for the Libelant; Sworn.

MR. DORR: Q. You are a licensed master, are you, Captain? A. Yes, sir.

Q. How long have you held your license? A. You mean as master?

Q. Yes. A. About nine years.

Q. You were master of the steamship "Svea" on November 29, 1922? A. Yes, sir.

Q. How long had you been on the "Svea" at that time? A. About 3½ years.

(Testimony of Karl Rohberg.)

Q. How large a vessel was the "Svea"? A. 370 net, 640 gross tons.

Q. What was her length? A. 174 feet, I think.

Q. And her beam? A. 38 and a fraction.

Q. A Steam schooner? A. Yes, sir.

Q. Engaged in the lumber-carrying trade? A. Yes, sir.

Q. Between what ports? A. Between Grays Harbor and Southern California, and San Francisco.

Q. What speed did she make? A. About 8, nothing over 8.

Q. That was about the best she would do, about 8 knots? A. Under the weather conditions of that day.

Q. You mean under the weather conditions of November 29th? A. Yes, sir.

Q. How was the "Svea" constructed below decks in regard to her hold, did she have more than one hold? A. One hold.

Q. How many hatches? A. One hatch.

Q. Where were you bound on November 29th? A. To San Francisco.

Q. From where? A. From Ventura, California.

Q. Light? A. Light.

Q. Where were you between 8 and 9 o'clock on the morning of November 29, say in the neighborhood of 9 o'clock? A. A little to the northward of Port San Luis.

Q. That is in San Luis Obispo County, isn't it? A. Yes, sir.

Q. How far off-shore were you? A. About twelve miles; that is a guess.

(Testimony of Karl Rohberg.)

Q. That is your estimate? A. Yes.

Q. Who was on watch after 8 o'clock on that morning? A. The chief mate.

Q. Charles Semsen? A. Yes.

Q. Do you know what time it was when you passed Point Conception? A. It was sometime in the morning watch, between 12 and 4, I think; I am not sure.

Q. Were you on deck? A. Yes, sir.

Q. Where did you head from Point Conception? A. I set the course off Point Arguello.

Q. That is to the northward of Point Conception? A. Yes.

Q. How far? A. About 13 miles.

Q. How far off did you pass Point Arguello, if you know? A. I told the mate to pass about a mile and a half or two miles off, nothing closer than that.

Q. You did not remain on deck? A. No. I remained on deck until I sighted Point Arguello Light.

Q. What course did you steer after passing Point Arguello? A. I told the mate to steer northwest.

Q. Is that magnetic? A. Practically so—pilot house compass, but there was no deviation to amount to anything.

Q. Where would that course—northwest—take you from a mile and a half off Arguello? A. It would not take us quite to Point Sur, but almost. Point Sur is here, and Arguello is here; northwest would bring us a little close, I would have to take out a little before I got to Point Sur.

Q. It would take you a little inside of Point Sur? A. Yes.

(Testimony of Karl Rohberg.)

Q. How long a run was that? A. 122 miles.

Q. How long did you continue on that northwest course? A. Until 9:15 a. m.

Q. On November 29th? A. On November 29th.

Q. Did you change the course then? A. At 9:15.

Q. What did you change to? A. Northwest by north half north.

Q. Also magnetic? A. Yes, sir.

Q. What was your purpose in changing the course? A. I came on deck about 8:49, and I was sizing up the weather conditions; there was a little head swell and a little northwest wind.

Q. How was the weather otherwise? A. Clear.

Q. The sun shining? A. The sun shining, nice and clear.

Q. How far could you see? A. I could see the land about 12 miles off, 12 or 15 miles. You could see further than that.

Q. Was there any haze or fog of any kind? A. No, sir.

Q. Go on and state why you changed the course? A. I observed the weather conditions, and I thought that by going in on the land—we were making about 7½ miles per hour, and I thought that by getting under the land and making for Piedras Blancas I could make a little better time.

Q. And you changed, as you stated, to northwest by north, half north? A. Yes.

Q. Were you on the bridge when the course was changed? A. Yes, I changed the course.

Q. You changed the course? A. Yes, sir.

(Testimony of Karl Rohberg.)

Q. How long did you hold that course? A. Until a few seconds previous to the collision.

Q. By the "collision", you are referring to the collision of the steamer "Newport," are you? A. Yes.

Q. What time did that occur? A. 9:53.

Q. A. M.? A. Yes.

Q. That was about 38 minutes after you changed your course? A. Yes.

Q. When did you first sight the "Newport"? A. About 9:20 a. m., about five minutes after changing the course.

Q. Did you sight her yourself at that time? A. Yes, sir.

Q. What was her bearing from your vessel? A. About three points on the port bow, 3 points or a little over.

Q. On your port bow? A. On our port bow.

Q. How far off was she at that time? A. Well, I should guess nothing less than eight miles.

Q. Was she hull down—could you see her hull? A. Yes.

Q. You could see her plainly, could you? A. I could see that she was a steamer; of course, I could not tell that it was the "Newport". I could see that she was a steamer.

Q. You could see her smoke? A. Yes, I could see her smoke, and see her masts; I could see she was a steamer.

Q. Was anyone else on the bridge at the time? A. No, sir.

(Testimony of Karl Rohberg.)

Q. Who was standing the watch? A. The mate was standing the watch, and I came up at 8:45 on the bridge, and then the mate went to look after the work on deck. Then he came up again a few minutes afterwards.

Q. He went below on deck for a few minutes? A. Yes, for a few minutes to look after the general work.

Q. And you relieved him on the bridge? A. Yes, sir, I relieved him on the bridge.

Q. And then you say he returned to the bridge? A. Yes, sir, he returned to the bridge.

Q. About what time? A. Say about half past nine, I guess, or probably a little bit sooner.

Q. After you sighted the "Newport", what course did you hold? A. Northwest by north, half north.

Q. The same course you had been steering? A. Yes, sir.

Q. What speed were you making? A. About 8 miles an hour.

Q. Did you make any change at all in your speed? A. No, sir. I didn't take the log. Maybe after 9:15, when I changed the course, we got a little more slant and probably we improved a little bit.

Q. You made no change in your engines? A. No, sir.

Q. You gave no command to your engine-room? A. No, sir. There was no change unless the vessel improved a little by going on a slant. That was the reason for my pulling in.

Q. But from 9:15 on you made no change at all? A. No, sir.

(Testimony of Karl Rohberg.)

Q. Just state what happened after that, and while you were on the bridge? A. About 9:30 or something like that, the mate came up on the bridge again.

Q. How far was the "Newport" away at that time? A. About six miles, anyway.

Q. What was her bearing at that time? A. About the same, about 3 points on my port bow, probably a little over three points; I did not take the exact bearing, but just looking at the angle, that was about how she bore.

Q. What happened when the mate came on the bridge? A. He took his glasses, and was looking at the steamer. I was on the bridge. The mate said, "What steamer can that be?" I said, "I don't know." Then the mate says, "I wonder where she is bound." I says, "I don't know." Then the mate said, "I guess it is one of the Admiral Line," or "the Pacific Mail Line"—I don't remember exactly what he said. Finally he said, "That is one of the Pacific Mail boats." He finally made it out. We were standing on the bridge at that time. Then, when we were about three miles apart, in my judgment, still the bearing did not change, and the mate passed the remark to me, "I wonder what he is going to do."

Q. Was he drawing in on you all the time? A. The same position, the same bearing. It didn't look very good. The mate says, "I wonder what he is going to do." I says, "I think he knows the rules of the road." We continued on our course, and at the same speed. Then a few minutes afterwards, when I think we were

(Testimony of Karl Rohberg.)

about two miles apart, or probably, a little over, I gave one blast of the whistle.

Q. What kind of a whistle did you have on the "Svea"? A. A steam whistle, a good whistle.

Q. How far could it be heard, under ordinary conditions? A. Well, it has been heard four or five miles. Under these conditions, it should have been heard about two miles and a half or three miles.

Q. Was there any answer from the "Newport" to your one blast? A. No, sir, I didn't hear the whistle. I should have heard it; I looked in that direction, and I didn't see no steam come out of his whistle.

Q. At that time she was in plain sight? A. Yes. Before I gave the one blast the mate said, "That's the 'Newport.'" He made her out with his glasses. I did not look through the glasses.

Q. He could read her name? A. Well, whether he could read the name, or not, I don't know, but he said, "That is the 'Newport.'"

Q. What did you do after that? A. Well, I should judge about a minute and a half or two minutes later I gave four blasts of my whistle.

Q. Were they long blasts, or short blasts? A. Short rapid blasts.

Q. How far apart were you then? A. Away over a mile—a mile, anyway.

Q. Did the "Newport" respond to that signal? A. No, sir.

Q. What did you do after that? A. I kept my course and speed.

(Testimony of Karl Rohberg.)

Q. What was the bearing of the "Newport" at that time? A. About three points on my port bow.

Q. On your port bow? A. Yes, sir.

Q. After you blew four blasts, were there any further signals made? A. I gave a second four blasts.

Q. How far away were you from the "Newport" when you gave the second four blasts? A. About three-eighths of a mile, I would judge about three-eighths of a mile—probably a little over.

Q. Did you hear any response from the "Newport"? A. No, sir.

Q. Did you see any steam from her whistle? A. No, sir.

Q. Then what did you do? A. I kept my course and speed.

Q. What did the mate do? A. He was standing alongside of me,—he didn't do nothing.

Q. He was on the bridge? A. Yes, we were on the bridge all the time, all this time.

Q. Where was your steering wheel located? A. Right below our feet.

Q. In a pilot house? A. Yes.

Q. You had a man at the wheel? A. Yes, sir.

Q. Where was your engine-room telegraph located? A. On the bridge.

Q. After the last signal that you have mentioned, what did your vessel do? A. Kept the course and speed.

Q. What did the "Newport" do? A. I don't know what she done.

Q. What did she do as far as you could see? A. Well, so far as I saw it looked like she was coming

(Testimony of Karl Rohberg.)

the same way, but I thought she would port her helm and come under my stern.

Q. Did she strike your vessel? A. Yes, sir.

Q. Where did she strike your vessel? A. Just about amidships.

Q. On which side? A. On the port side.

Q. Was any word passed to the wheel on your ship? A. Just before she struck, the mate sung out, "Hard a-port." Of course. I did not countermand that order. We were not very far apart, and there was going to be a collision, and I thought, "All right, let it go that way and she will strike more straight, instead of slanting aft, but of course we did not swing any—not to amount to anything.

Q. Was there any chance at that time to avoid a collision? A. No, not on my side.

Q. What damage, if any, was done to the side of your ship when the "Newport" struck her? Just describe what happened there. A. It broke the rail on top; the guard rail was bruised up; I don't know how far it was, and I don't know how badly it was, but it cut the planks below the water line.

Q. Also above the water line? A. Also above the water line, yes, sir.

Q. Did your ship take any water? A. Well, at the time right away we were not sure of it, but we started all the pumps; about five minutes afterwards, when we were clear of the "Newport", somebody on the "Newport" asked me to stand by them. I started to follow them up. In the meantime we tried to find out how much water she was making.

(Testimony of Karl Rohberg.)

Q. That who was making? A. The "Svea." The chief said, "She is gaining." Then we manned the hand pumps to help along to try to keep her afloat and make Port San Luis.

Q. Did you have the pumps working? A. All the pumps in the engine-room, the siphon, the sanitary pumps, and everything that we had, everything that was on the bilges. Then she was gaining, and so we manned the hand pumps. Then I told the chief sngineer to try and pump all the oil from the port side over to the starboard. I told the cook to pump out the port water tank, if he could, in the galley, with his hand pump. I sent a man tc pump water into the starboard empty oil tank so as to make the starboard list in the water.

Q. What did the "Newport" do immediately after the collision? A. She got clear of us.

Q. How did she get clear of you? A. I don't know if she backed away, or what she done, but she got away from our side a little. Then, with the sea, I guess we were swinging a little, and with the sea she was swinging, and she just touched us a little with her stern, just a bruise; it can be seen on the vessel yet. One man in uniform asked me to stand by her.

Q. Where was he? A. He came up on the forecastle head buttoning his uniform coat, and he said, "Stand by us."

Q. Did you exchange any conversation with anybody on the "Newport"? A. The first word I said to them was: "You are fine navigators." He says to me, "Stand by us." I said, "All right." I put my hand up and said "All right." Then I looked at the "Newport's"

(Testimony of Karl Rohberg.)

bow and I passed the remark to the mate, "Her bow is badly smashed, she probably will sink."

Q. Then what did the "Newport" do after that? A. She sheered off and was heading for Port San Luis, and we followed her up.

Q. Did you keep close to her? A. By the time I got around I started half speed, or slow speed, I don't remember what bells I gave, but I started to follow her up. Afterwards, I gave full speed, trying to catch up to her, to find out how she was, but she was getting farther away from us all the time, I couldn't catch her.

Q. Did you make any signals to her? A. I blew four blasts of the whistle. Then, two or three minutes afterwards, I blew one blast. Two or three minutes afterwards I blew another blast. Then I put up the distress signal, consisting of the "N" and "C".

Q. What kind of a signal is that? A. A distress signal, with the letters "NC".

Q. Flags? A. Yes.

Q. International code? A. International code.

Q. Where did you hoist your distress signal? A. On the forward rigging.

Q. How far could that be seen? A. A couple of miles, anyway.

Q. Captain, in the weather conditions existing at the time of the collision and immediately prior thereto, how far was it possible to have seen the "Svea"? A. Seven or eight miles; probably more than that.

Q. What did you do from then on? You say you were heading toward the shore. A. I was close enough

(Testimony of Karl Rohberg.)

inshore. When I could not catch the "Newport" I tried to save distance. I followed the shore line, trying to make San Luis.

Q. Did you work your engines? A. Yes, we were working them until 11:40.

Q. Why did you stop working her engines? A. Because the fires were out; you couldn't keep steam up when the fires were out.

Q. What put the fires out? A. The water.

Q. The water coming in through the hole on the ship's side? A. Yes, sir.

Q. What did you do after the fires were out? A. I headed right in shore, and used the lead while she had headway. Of course, I could have beached her before, but I didn't want to beach her. I got her into 19 fathoms of water. She had headway after we stopped the engines. At 11:40, in 19 fathoms of water, I dropped the port anchor.

Q. How long did you stay by the ship? A. Until 11:15 that night.

Q. What was her condition when you left her? A. She was on her side, lying on her side.

D. Did you return to her after that? A. I returned the next morning.

Q. What was her condition then? A. She was bottom up.

Q. Was there anything more than could have been done to have kept her afloat that was not done? A. Not to my knowledge, or, I don't think to the knowledge of anybody else on board that ship. The chief mate suggested after anchoring to put a canvas on the outside;

(Testimony of Karl Rohberg.)

we had a brand new tarpaulin on top of the tanks forward, and we got that out and got lines around the bow, with a chain, down abreast of that hole, two lines; then we pulled the lines around and tied the tarpaulin and pulled it over the side, getting it abreast of the hole to be the canvas to such into the hole, and it probably would have stopped it, but on account of the sea it would not suck in.

Q. Did the schooner "Oregon" afterwards come alongside the "Svea" where she was anchored? A. Yes; she was sent there afterwards.

Q. When did the "Oregon" arrive? A. December 1st, I think it was.

Q. What did the "Oregon" do? A. She dropped her anchor and used a grab hook to pick up the "Svea" anchor chain. She maneuvered around. At first she couldn't get it; then she tried to pick up her anchor with her anchor. She got the anchor and she had a hard job to clear herself. The captain of the "Oregon" anchored again. We ran the grab hook out with a gasoline launch but we missed it, we tried it a second time and missed it, but the third time we grabbed it and got the chains up and then got the booms up; we got a chain up by the rail and kept on taking a couple of fathoms at a time until we got the anchor on board the "Oregon." Then we cut the anchor chain. Then we shacked on a 10-inch hawser from the "Shawnee", and we cut the stoppers, and the "Shawnee" got hold of the tow and proceeded to San Francisco.

Q. And the "Oregon" also accompanied the "Svea" to San Francisco? A. Yes, up to Pigeon Point.

(Testimony of Karl Rohberg.)

Q. Did you obtain the services of any gasoline launches from San Luis Obispo? A. Yes.

Q. How many launches did you have out there? A. We had three launches out there the first night to see if I could tow her into Port San Luis before she got filled up. We could do nothing ourselves, because the fire was out.

Q. Did you have some launches after that? A. I had a launch the next day to go out and see how she looked. Then we had the launch while we were picking up the anchor chain, and we had the grab hooks, as they call them.

Q. What became of your crew? A. I sent the second mate and three men in the boat for assistance to Port San Luis.

Q. That was in one of your lifeboats? A. Yes.

Q. What became of the rest of the crew? A. I sent ten men up on the steamer "Lindauer."

Q. When did the steamer "Lindauer" arrive on the scene? A. A little after five o'clock.

Q. And they took your crew to San Francisco? A. I asked the captain to take them up and he said all right.

Q. What became of the "Svea" after she was brought to San Francisco? A. After the "Shawnee" got in, the Red Stack tug went out the next morning to meet her and towed her in between Piers 41 and 43.

Q. And she remained there for several days? A. She remained there for several days.

Q. Was she still bottom-up at that time? A. Yes. She was on the broadside while they were pulling her around the corner of 41.

(Testimony of Karl Rohberg.)

Q. And she was subsequently righted. A. She was subsequently righted and put in the dry-dock at the Moore Shipbuilding Works, and, finally, she was put in the dry-dock at Barnes & Tibbits Shipyard, and then my services were not further required.

Q. What was the condition of the "Svea" as to seaworthiness prior to the collision? A. No. 1, in the best of condition.

Q. In good, seaworthy condition? A. In the best of condition.

Q. How big a crew did you carry, Captain? A. Seventeen, at the time of the collision. We carried 19 sometimes, but I was two men short. I had a full crew as required by law.

Q. You had a full crew, as required by law? A. Yes, sir.

Q. Are you about to go to sea? A. Yes, sir.

CROSS EXAMINATION

MR. MACKEY: Q. Captain, in the log-book, here, I cannot make out one part of it. It says: "9:53 Collision with"— and then on the same line are ditto marks under the course NWx½N; then, reading along the same line on the opposite page it says: "Steamer Newport." Does that mean collision with steamer "Newport"—reading right over the line, here? A. Yes.

Q. Then, on the next line, under the line which says "9:53", it says, "Heading in for San Luis, all off"— what is the next word? A. "All pumps are going to keep the water off."

Q. The word after "all" is "off"? A. Yes.

Q. And the next word on the opposite page is "pumps"? A. Yes.

(Testimony of Karl Rohberg.)

Q. "All pumps going to keep the water off"? A. Yes.

Q. You have the word "keep" spelled "cipe". A. Yes.

MR. DORR: Q. The mate wrote that, didn't he? A. Yes. He is poor at spelling, and I am poor at spelling, too. My kid, nine and a half years old, is a better speller than I am.

MR. MACKEY: Q. How was your crew made up, how many deck officers did you have? A. Two.

Q. Two besides yourself? A. Yes.

Q. How many engineer officers? A. Three.

Q. The chief, the first assistant, and the second assistant? A. Yes.

Q. That makes six thus far. A. Yes.

Q. How many in the engine-room force? A. Three firemen.

Q. That makes nine. Who were the others? A. The cook and the cabin man.

Q. That makes 11. A. And six able seamen.

Q. That makes 17. A. I used to carry six seamen and two winch drivers, but one winch driver left and one seaman left, and then one winch driver went as a seaman. I was not required to carry winch drivers.

Q. When was the last annual inspection prior to the time of the collision? A. You can find the date in Wilson's office. It was not very long before that. It was not more than a couple of months before that. I should say about two months previous to that.

Q. Had you been in dry-dock at any time between the last annual inspection and the time of the collision? A. No.

(Testimony of Karl Rohberg.)

Q. You had not been overhauled at all between those two times? A. No, not between the inspection and this time, but we were overhauled shortly before that, we were in dry-dock shortly before inspection. It was in June or July that we were in drydock. I guess it was in July.

Q. Did you go into dry-dock on your annual inspection? A. No, not if we have been there previously before that. We go in about once a year, or once in about fourteen months, or something like that.

Q. You ordinarily make a little water, don't you, in the bilges? A. Even when we are loaded, there is nothing on except the line pump. It ordinarily makes a little bit. The line pump keeps that dry. We never had to put a donkey on to keep it dry.

Q. The only place you were making water after the collision was through the hole that had been opened up? A So far as my knowledge goes; I don't think it was anywhere else.

Q. How far above sea water was the guard of the "Svea" at the point where the collision took place? You have about a 12-inch guard running around the side of the ship, haven't you? A. Yes, sir.

Q. How far from the guard to the sea water was it at the point where the "Newport" came in contact with you? A. About four or five planks below, I should think, if you were in smooth water. In a swell, the water comes right up to the guard. In smooth water I think it would be about four or five planks. I would not be dead sure how many.

(Testimony of Karl Rohberg.)

Q. What is the maximum speed the "Svea" is capable of in smooth water? A. When it is smooth and she is empty, she will make about 9 or 9½.

Q. When she is empty she is pretty well down in the stern, isn't she? A. She is about 14 feet aft, and about 7 feet forward—7 feet 6 inches.

Q. The engine, and all the superstructure, is aft? A. Yes, the engines are aft. Forward we have the two oil tanks. Those were empty at the time.

Q. Those were empty at the time of the collision? A. Yes, except for a few barrels.

Q. Under those conditions, you set down pretty well on the stern? A. Almost, not quite. The "Oregon" and the "Idaho" draw 19 feet aft, and they draw 5 feet forward. They stand right like this. In any wind, at all, you can not handle them, hardly, because the bow is right up. We are a little bit more on this angle.

Q. You find some difficulty in traveling light, don't you, if there is any wind? A. Oh, no.

Q. She will go from one side to the other? A. Oh, no.

Q. You are able to keep the course all the time, are you? A. Yes, sir.

Q. But it takes quite a little bit of helm, doesn't it? A. Not in those conditions.

Q. No, but I mean in much of a wind. A. Yes.

Q. As she was in that condition—light and setting down by the stern—she will turn pretty rapidly, won't she? A. She would turn fairly good, I should think.

Q. What would be the circle in which you would turn, do you suppose, under those circumstances? A. I

(Testimony of Karl Rohberg.)

could not tell you the circle, because I never tried that. If I have to make a landing like that, I fill, and back, and fill again. I never was going full speed and made a round turn on her, I never tried it.

Q. Could you estimate it, going full speed ahead and putting her helm hard over? She would turn in 300 or 400 feet, wouldn't she? A. No, not quite that.

Q. She would come pretty close to it, wouldn't she? A. No, not quite that.

Q. How much? Do you think she would turn in 600 feet? A. How many feet to a mile—let me see.

Q. Let me ask you this question. Do you know the channel down there in San Pedro, the main channel? A. Yes.

Q. That is about 500 feet, isn't it? A. Yes.

Q. Do you think you could turn around in that? A. I could turn around by filling and backing.

Q. I mean in going full ahead under a hard helm. A. No.

Q. How much more space do you think you would have to have? A. I don't think I could make it in twice that space.

Q. Say your were lying alongside of a dock down there, and headed downstream, and you went ahead on your engines and put your helm hard over, don't you think you would come pretty close to turning her around in that distance—light, and setting down by the stern? A. No, sir, not half.

Q. She would turn around, then, in about 1000 feet? A. She might, and she might not.

Q. If you were going eight knots, and put your helm hard aport and reversed your engines full speed

(Testimony of Karl Rohberg.)

astern, what do you think would be your turning circle? A. I only could make a guess at that.

Q. All right, make a guess. A. In a quarter of a mile, probably.

Q. You don't think she would do it in less than that? A. I don't think so.

Q. Going eight knots, and then putting your engines full astern, how far do you think you would travel before you came to a stop? A. If we were empty, as in this case, it probably would have been a quarter of a mile, or a little bit less, probably.

Q. Before the local inspectors, didn't you say it would be 200 or 250 feet? A. No. The mate said that, but I would like to see him take off the headway in that distance. I never tried that, so I am only guessing. Wherever I make a wharf, I go half speed, first, and then I slow down, and then I back, and then come up, and even then I come sometimes too hard against the wharf. In this particular condition, it might have been less than a quarter of a mile. The mate said 250 feet. I remember that answer, because I have laughed about that answer with other steam schooner captains.

Q. You saw the "Newport" about eight miles away, and from that time on until the time of the collision her bearing stayed the same? A. Yes.

Q. When did you first have a doubt as to whether she was going to keep out of your way? You expected her to get out of your way, according to the rules of the road, did you? A. Yes, sir.

Q. When did you first have a doubt that she was going to do that? A. Just when we were about 100

(Testimony of Karl Rohberg.)

feet apart, I guess. We were almost ready to have a collision, and at the same time the mate sung out"Hard aport."

Q. When you blew the second distress signal, did it not occur to you that there was something wrong on the "Newport"? A. No, I don't think so.

Q. You didn't see anybody on the bridge, did you? A. I didn't see anybody, but I didn't know whether there was anybody there, or there was not anybody there.

Q. You couldn't see anybody there? A. No.

Q. Didn't it occur to you that there was something wrong on her then? A. No, it did not occur to me that way.

Q. What did you blow your distress signal for? A. To call his attention to me. It did not look good to me then, the way things looked.

Q. You didn't think then he was going to keep clear of you? A. No, but I just called his attention to it to keep clear of me.

Q. And you knew if he kept on you would come to-together? A. No, I didn't know that, but it looked doubtful to me.

Q. When the bearing remains the same, and there is no change in the course of either vessel, and no change in the speed, you know they are going to come together, don't you? A. As I said before, I never took exact bearings, it was just a guess at that bearing.

Q. When she goes along from eight miles to within three-eighths of a mile or half a mile, and the bearing does not change substantially, you can get it pretty

(Testimony of Karl Rohberg.)

close at that time, can't you? You know by that time the bearing is staying the same, in that distance, don't you? A. Well, just about, yes.

Q. You don't have to do any sighting to know that, do you? A. But there was plenty of time for him to clear me at that time.

Q. But you didn't see any activity on the bridge, at all, did you? A. Well, I didn't see it, no.

Q. And your idea in blowing the danger signal was to try and get somebody to do something over there? A. Yes, sir.

Q. And you were not getting any signals from him? A. No.

Q. It looked rather as if nothing was going to happen on there, didn't it? That was your impression, wasn't it, although you expected him to do something? It was your impression that there was something wrong over there and they ought to have some notice that you were coming along side? A. It was not exactly my impression that there was going to happen something.

Q. What was your impression? What was the reason you blew the danger signal? A. Well, they didn't answer my passing signal.

Q. They didn't answer your passing signal in the first instance? A. No.

Q. They didn't answer your first distress signal? A. No.

Q. They didn't answer your second distress signal? A. No.

Q. And you didn't see anybody on the bridge, and there was not any change in course; now, didn't all that

(Testimony of Karl Rohberg.)

convey to you the idea that there was something wrong and that you ought to blow a danger signal and try and get them to do something more than they were doing? A. Yes.

Q. Isn't that the fact? A. Yes, I tried to call their attention.

Q. Now, honestly, captain, as you went along there and you didn't get any result from anything that you did, didn't it rather strike you that there was something wrong there, that they ought to have their attention called to it? A. That is why I blew those whistles, to call their attention to it.

Q. You were afraid that they were not on the job, and they were not going to keep out of the way, as they were supposed to do: Isn't that correct? A. No, I was not afraid of that. I thought they would keep away, but they didn't pay any attention to me. I though they were going about their business and I could go about mine.

Q. Why did you blow anything at all? Why did you blow any danger signal? If you were just going to go about your business, it was their business to keep out of your way, wasn't it? A. Yes.

Q. And your business was to go along and hold your course and speed. You figured you were all right. You figured that there was not anything for you to do but to go ahead, didn't you? A. Yes, sir.

Q. And you didn't have to blow any signals if you didn't want to? A. No.

Q. And you figured that it was entirely up to him to keep out of your way? A. Yes, sir.

(Testimony of Karl Rohberg.)

Q. When it occurred to you to blow the danger signal the first time, wasn't that because you did not see any activity on the bridge of the "Newport", she did not seem to be doing anything to keep out of the way, and you wanted to notify her or call her attention to that situation? A. Yes.

Q. And when you blew the second danger signal, you thought the condition was much worse, didn't you? A. I thought the condition was the same.

Q. Well, you were coming closer together, then, weren't you? A. Well, there was plenty of time to clear us.

Q. But even then you figured that they had not indicated at all any change of action on the "Newport", and that they would have to do something or there would be a collision, because you were going to go ahead on your own course: That is correct, isn't it? A. Yes.

Q. I am just trying to get at what was going on in your mind at that time and why you blew those danger signals; you must have had a fear that they were not paying attention.

MR. DORR: Let him state it, and don't argue it with him, Mr. Mackey.

A. Well, I thought I would blow the danger signals for them to attend to their duties.

MR. MACKEY: Q. And they didn't seem to be doing it? A. Well, I didn't know whether they were doing it, or not, but it didn't look good to me. They might have slowed down at the same angle, you know; I didn't know what was going on on that vessel.

Q. But you could not see what was going on? A. No; I could not see the telegraph.

(Testimony of Karl Rohberg.)

Q. But it didn't look good to you at all? A. It didn't look good to me, but at the same time, after I blew the second four blasts there was plenty of time for them to act, and plenty of time for me to act if I was given some signals.

Q. And that was about between three-eighths and half a mile away? A. Yes.

Q. The two vessels were that much apart? A. Yes.

Q. You didn't give any more signals? A. No.

Q. And you went up to within about 100 feet of the "Newport" before the mate gave the order to port the helm? A. Yes.

And then at 9:53 the collision occurred, and at the same instant you put the engines full astern? A. I stopped my engines.

Q. You stopped your engines? A. I told the mate to stop.

Q. How far apart were the vessels when you realized that they were not going to do anything on the "Newport"? A. Well, about a shiplength.

Q. About one of their shiplengths, or yours. A. About one of their shiplengths.

Q. That is about 400 feet? A. No, not quite that.

Q. About 250 feet? A. I beg your pardon, that was my error, about 200 feet.

Q. About 200 feet? A. Yes, sir.

Q. It might have been 250? A. Well, I don't think so, no.

Q. If you had reversed your engines at that time, what would have happened? A. I would have rammed into the "Newport" amidships.

Q. If you had reversed your engines. A. Yes.

(Testimony of Karl Rohberg.)

Q. You would have rammed her amidships? A. In my judgment, I would have rammed her about amidships. I would probably have taken off that much headway. I would have struck her just about like this (indicating).

Q. If you had reversed your engines when you were, say, 200 feet away, and then put your helm hard a-starboard, what would have happened? A. I would have rammed the "Newport", in my judgment.

Q. How would your ship's head turn? A. If I put my helm hard a-starboard and the engines full astern, she would have about stood still. She had headway enough to swing, and the backing of the wheel would have counteracted the helm. She would just about head the same way.

Q. If you put the helm hard a-port, what would you have done? A. She would have swung probably to starboard, the ship's head would then have swung to starboard.

Q. And you would have swung her pretty well around, too, wouldn't you? A. It would swing a little, but not very much.

Q. In the 200 feet, with your engines full astern and your helm hard aport, how many points do you think your head would have swung? A. I could not answer that question.

Q. How far will the ship's head swing, going 8 knots, without any further action from the engines, and with your helm hard aport, how many points will you swing off? A. In 200 feet, about a point.

(Testimony of Karl Rohberg.)

Q. And if you reverse your engines she will swing more than that, won't she? A. Probably a little more, probably not; probably a little more than a point.

Q. If you had starboarded your helm when you blew your four-blast danger signal, you would have cleared the "Newport" entirely, wouldn't you? A. If she acted the way she did?

Q. If she kept her course. A. No, I could not.

Q. Didn't you say before the local inspectors that if you had starboarded your helm at the time you blew your four-blast signal you would have cleared? A. If she kept her course, I guess I could have cleared it.

Q. You would only have had to swing about a point to port in order to clear her: Is that correct? I mean if the action had been taken when you blew your four-blast signal, the second one? A. Well, if she kept the same course after I blew the four blasts I could have cleared her; I think I could.

Q. If you had reversed your engines at the time you blew your four-blast signal—

MR .DORR: Which four blasts do you refer to?

MR. MACKEY: The second four blasts.

MR. DORR: The second four blasts all through.

MR. MACKEY: Q. (Continuing) —there would have been no collision, would there? A. I should think I could propably have taken off the headway.

Q. Didn't you say down before the local inspectors that if you had reversed your engines at the time you blew your second four blast-signal that you could have avoided her?

MR. DORR: That is the same answer; he said he could have taken off the headway.

(Testimony of Karl Rohberg.)

A. I could have taken off the headway. That means I could have brought her to a stop.

MR. MACKEY: Before you got up to her? A. Before I got up to her.

Q. In other words, you would not have come together? A. No, we would not have come together.

Q. If you had slowed down at any time between the first four-blast-signal and the second one, say you had put her at half speed, don't you think you could have avoided the collision? You would have cut down speed enough, wouldn't you, so that she would pass by the point of intersection of your courses before you got there? A. No, not by slowing down alone; I would have hit the "Newport."

Q. What is your speed at half speed? A. About a mile less than full speed.

Q. About a mile less? A. That is about all.

Q. That puts her down to only seven knots? A. About that.

Q. How many turns do you make at half speed? A. I never counted them, I don't know, but I have been running half speed in the fog, and I know that she don't slow more than a mile. If I am going in the Bay half speed, it makes pretty nearly the same speed as at full speed.

Q. If you put her at slow speed, what do you get by way of knots? A. On slow speed we would probably get about two miles an hour.

Q. The only change of speed you have is full speed 8 knots, half speed 7 knots, and slow speed 2 knots? A. About that. I have been after them all the time

(Testimony of Karl Rohberg.)

to give me slow—when I give "Slow"—to go dead slow. When I make a landing that is the way I want it, dead slow. That is the understanding I have with my engineers.

Q. At the time the vessels came together, they were just about at a right angle, were they not? A. Just about at a right angle.

Q. After the collision, after the vessels had just separated so that they were clear of each other, somebody on the "Newport" asked you to stand by? A. Yes.

Q. And then they headed for the beach? A. Yes.

Q. And you swung around and headed on a parallel course to theirs, did you—approximately? A. Yes.

Q. You first went slow ahead? A. Well, I don't remember what bells I gave, exactly.

Q. Why didn't you give full speed ahead right off the bat—right away? A. Well, I didn't think the "Newport" was going full speed, I thought it was all right until I turned around.

Q. How far apart were you when you started toward the beach, paralleling her? A. I could not be sure of that.

Q. Your courses were about two or three miles apart, weren't they? A. Our courses?

Q. Yes; he was headed for the beach ahead of you, wasn't he? A. Yes.

Q. And you were a little bit north of him, also headed for the beach, on a course parallel to him? A. I was headed for him. When I came around I tried to head for him.

MR. DORR: Q. In other words, you were astern of him? A. Yes, I was astern of him. This was the

(Testimony of Karl Rohberg.)

"Newport"; after she got clear she started to head this way toward the beach, and after she got around our quarter she started to go for the beach. By the time I turned around, I went right for her.

MR. MACKEY: Q. And at that time your idea was to follow her up, was it? A. Yes, because she asked me to stand by. I wanted to find out how she was.

Q. Did she look pretty badly damaged? A. Her stem looked pretty badly damaged.

Q. She looked as though she might sink? A. As if she might sink, yes.

Q. At that time you did not consider your condition was as bad as hers? A. I did not, from the bridge, but after she got away I went down to the deck and sized things up, and in the meantime I found out that we were worse off than she was.

Q. How far apart were you when you put up your flags, your distress flags? A. I guess about a mile and a half.

Q. Do you think it might have been more than that? A. Hardly any more.

Q. How far away from the beach were you then? A. About nine or ten miles.

Q. You proceeded in, then, between two and three miles? A. We kept heading in for the beach.

Q. You had proceeded in from the time of the collision about two or three miles before you put up your distress flags; the collision occurred about 12 miles off the beach, didn't it? A. Yes, but that is a guess.

Q. And your other answer is a guess, too, isn't it, that you were about nine miles from the beach before you put the flags up? A. Yes.

(Testimony of Karl Rohberg.)

Q. So you must have gone in about two or three miles? A. Yes.

Q. The wind was off your stern, wasn't it; you were running with what wind there was? A. Well, I don't remember just exactly the course we steered. I watched the "Newport." She started getting ahead of us and I could not catch her. Then I blew four blasts; then I blew one blast; then another one blast.

Q. How far apart were you when you blew your first blast? A. About a mile and a quarter, or something like that.

Q. How far apart were you when you blew your first one-blast signal? A. Well, that all happened within a quarter of a mile.

Q. All those signals happened within a quarter of a mile? A. Yes, from first to last. I blew four when I found that we were in danger, and then another one, and then another one. There was only a couple of minutes between. We were going fullspeed, and she was going full speed, I guess.

Q. And then you put up your flags? A. Yes. When she paid no attention to the signals, I put up the flags. The second mate put them up.

Q. There was not very much wind, was there? A. There was a northwest wind.

Q. The flags hung down; the flags were not flying out free, were they? A. Well, not very free, but there was enough wind to keep them out.

Q. Do you think enough to keep them out flapping? A. Well, not exactly.

(Testimony of Karl Rohberg.)

Q. Do you think they would tend forward or aft? A. Well, a little more forward. We had the wind in the starboard quarter, like.

Q. In the starboard quarter? A. Yes.

Q. Then they would tend off your port bow? A. Yes.

Q. A good bit of the time they would just be hanging down, wouldn't they? A. Oh, no, there was wind enough so that they were blowing out.

Q. Are you sure of that, Captain? A. Yes. First, they were in the main rigging; the mate suggested to the second mate to put them in the forward rigging, because they would show better. There was enough wind to keep them out.

Q. So you took them out of the main rigging? A. Yes, and put them in the fore-rigging.

Q. Who did that? A. The second mate.

Q. How far off the beach were you when you put them in the fore-rigging? A. Probably about a mile closer than when we blew the whistles; it did not take very long.

Q. How much water was there in your hold at the time you dropped your anchor? A. About four feet in the hatch, on top of the second, about four feet or four and a half feet.

Q. What do you mean by "on top of the skin?" My question is, how deep was the water in your hold? A. About four feet.

Q. Four feet of water in your hold? A. On the skin, yes.

(Testimony of Karl Rohberg.)

MR. DORR: Q. Above the floor, do you mean? A. Yes. First comes the ribs; there is planking outside; the planking inside is the skin.

Q. You mean underneath the floor of the hold. A. No.

Q. I mean there is some distance underneath the floor, between the floor and the skin of the ship? A. Yes.

Q. How much distance is that? A. I don't know how big the timbers are that are in there.

MR. MACKEY:

Q. And you had about four feet of water on top of the floor of the hold at the time you dropped your anchor? A. Yes, sir.

Q. How deep is your hold, from the main deck down to the floor? A. I don't know, but about ten or eleven feet—about.

Q. Why didn't you drop your starboard anchor instead of your port anchor? A. Because the cut was on the port side; by taking the port anchor I though it would have listed her over more to starboard, and it would keep the cut out of the water.

Q. Why did you think it would list her over to starboard? A. Anything you take off on the port side would list her over the other way. I was pumping the water out of there at the same time, trying to list her over to starboard.

Q. What is the weight of your anchor? A. The anchor weighs about a ton, and then the chain; I gave her all the chain, about 90 fathoms of chain; I don't know the weight of that.

(Testimony of Karl Rohberg.)

Q. Were you rolling in there to a swell as you lay at anchor? A. No. She turned around and laid her head to the wind and sea; there was a little shop coming along; she laid her head to the wind and sea.

Q. But you were pitching a bit? A. Pitching, yes.

Q. And whenever you would come up with the swell there would be a pull on your anchor chain, wouldn't there? A. Not much.

Q. There would be some, wouldn't there—there always is? A. We had all the chain out. By having all the chain out there is not very much pull on it.

Q. Whenever you rise to the pull, you have to lift all that chain, don't you? A. Yes, lift the chain.

Q. Then with a long scope of chain out, and your riding to the swells, and your rising up with the swell, there is a tendency to pull more chain out, isn't there? A. Yes, a little tendency.

Q. Considerable of a tendency? A. Yes. It depends on the swell and the wind, of course.

Q. If you have a heavy swell, she is going to pull more? A. Yes.

Q. You had a pretty heavy swell at this time, didn't you? A. Well, not very heavy.

Q. What do you mean by "not very heavy"? She would go down quite a bit, wouldn't she, and she would come up with a jerk? A. No, it was not heavy enough for that. It was not a very heavy swell. If it was a very heavy swell, it would not have been safe in small boats.

Q. You had no difficulty in launching your boats, did you? A. No.

(Testimony of Karl Rohberg.)

REDIRECT EXAMINATION

MR. DORR: Q. Did the fact that you paid out your port anchor in any way contribute to turning that vessel over? A. Well, I could not notice it, whether it did, or not. The mate asked which anchor, and I said, "You better pay out the port anchor, it might list over to starboard and keep the water out of the cut."

Q. It was your best judgment to use the port anchor? A. Yes.

Q. There have been some questions asked by counsel in regard to avoiding a collision by stopping after you blew your last four whistles; those answers that you made to those questions are based on the assumption, are they not, that the "Newport" would hold its course and speed? A. Yes, sir.

Q. Did you, in that situation, consider whether or not you should stop, or back, or whether you should hold your course and speed? A. I did consider it.

Q. And what did you decide? A. I decided to go ahead, that she is going to change.

Q. Why did you decide to go ahead? A. Because I had the right of way.

Q. And what did you think that the other man might do? A. That the other man might port his helm, or stop and back, or clear me; I did not consider which way, but I considered that he would clear me in some shape or other.

Q. What would have happened if you had slackened your speed, or stopped your engines, or reversed your engines in an effort to avoid a collision, and at the

(Testimony of Karl Rohberg.)

same time the "Newport" had ported its helm? A. There would have been a collision.

Q. And that is what the "Newport" was obliged to do under the law, wasn't it, either that or some other step to avoid the collision? A. Yes, sir.

RECROSS EXAMINATION

MR. MACKEY: Q. Your whole idea was that you were to hold your course and speed? A. I was considering about whether I should take action.

Q. When did you consider that? A. After the second four blasts.

Q. How long after, or was it at the same time? A. Probably half a minute after, just a little after blowing the second four blasts and sizing up the things.

Q. As a matter of fact, you were thinking about it at the time you were blowing your four-blast signals? A. No, after blowing it.

Q. How far apart were the vessels when you commenced to consider whether to stop, or to reverse, or to do something yourself? A. Over a quarter of a mile. I could only come to the conclusion that if I acted there would be some mistake, and so I came to the conclusion to keep my course and speed.

Q. You were going to go right through with your course and speed, regardless of what he did? A. I didn't know what he was going to do. I considered that if I acted, and if he acted, there would be a collision sure.

Q. When you began to figure on what you should do, you had some doubt as to what he was going to do,

you had some doubt as to whether he was going to keep out of your way? A. Yes.

MR. DORR: Q. It was only a doubt, though wasn't it, Captain? A. Only a doubt. There was a chance for him to go clear.

Q. You knew what his duty was, under the circumstances, didn't you? A. I knew what his duty was, yes.

UNITED STATES OF AMERICA,)
STATE AND NORTHERN DISTRICT OF)
CALIFORNIA,) ss.
CITY AND COUNTY OF SAN FRANCISCO.)

I certify that, in pursuance of stipulation of counsel, on Friday, December 22, 1922, before me, E. M. CLARK, a Notary Public in and for the City and County of San Francisco State of California, at the offices of Messrs. ANDROS & HENGSTLER, in the Kohl Building, in the City and County of San Francisco, State of California, personally appeared JOHN MC KEOWN, CHARLES S. SEMSEN and KARL ROHBERG, witnesses called on behalf of the Libelant in the cause entitled in the caption hereof; and F. W. DORR, ESQ. appearing as proctor for the Libelan*d,* and RUSSELL A. MACKEY, ESQ., representing Messrs. Mc CUTCHEN, OLNEY, WILLARD, MANNON & GREENE, appeared as proctor for the Respondents, and the said witnesses having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in said

cause, deposed and said as appears by their depositions hereto annexed.

I further certify that the depositions were then and there taken down in shorthand notes by CHARLES R. GAGAN, and thereafter reduced to typewriting; and I further certify that by stipulation of the proctors for the respective parties, the reading over of the depositions to the witnesses and the signing thereof were expressly waived.

And I do further certify that I have retained the said depositions in my possession for the purpose of mailing them with my own hands to the Clerk of the Southern Division of the United States District Court in and for the Southern District of California, the court for which the same were taken.

And I do further certify that I am not of counsel, nor attorney for either of the parties in said depositions and captioned named, nor in any way interested in the event of the cause named in the said caption.

IN WITNESS WHEREOF, I have hereunto set my hand in my office aforesaid this 7th day of February, 1923.

E. M. CLARK (SEAL)
Notary Public
In and for the City and County of San Francisco, State of California.
My Commission Expires April 22, 1924.

Filed Feb. 9, 1923. Chas. N. Williams, Clerk, By L. J. Cordes, deputy clerk.

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS

Now comes Pacific Mail Steamship Company, a corporation, respondent, claimant and cross-libelant above named, and (J.) George McKinnon, appellants herein, and say that in the record, opinions, decisions and decrees in the above entitled cause there is manifest and material error and said appellants now make, file and present the following assignment of errors on which they rely, to-wit:

I.

That the District Court erred in rendering the final decree herein of the date the 10th day of March, 1926.

II.

That the District Court erred in rendering the interlocutory decree in the above entitled cause of date the 15th day of September, 1924.

III.

That the District Court erred in rendering its opinion in the above entitled cause of date the 10th day of September, 1924.

IV.

That the District Court erred in holding and deciding that the Steamship "Svea" was not in fault in respect to the collision involved in this cause.

V.

That the District Court erred in holding and deciding that the Steamship "Svea" first realized that the "Newport" was not going to do anything to avoid the collision when the ships were but two hundred feet apart.

VI.

That the District Court erred in holding and deciding that the Steamship "SVEA" could not do anything which would have prevented or avoided the collision with the "Newport" after she realized that the "Newport" was not going to keep out of her way.

VII.

That the District Court erred in holding and deciding that the Steamship "Svea" was justified in proceeding on her course and with unabated speed until she was within one hundred feet of the "Newport", and in not holding and deciding that the "Svea" should have taken steps to avoid the collision while there was yet time and opportunity for her to do so.

VIII.

That the District Court erred in not holding and deciding that at a time when there was still ample opportunity for the "Svea" to avoid the collision, her navigators had clear indications that the "Newport" was not going to keep out of the way.

IX.

That the District Court erred in not holding and deciding that the "Svea" was in fault for not taking steps to avoid the collision before it was too late to avoid the collision.

X.

That the court erred in not holding and deciding that as the Master of the "Svea" was always uncertain as to the activities of the "Newport" and of those in charge of her navigation, it was the plain duty of the

"Svea" to solve that uncertainty in favor of safety by taking timely steps to avoid the collision before plunging into a position where a collision would be the natural if not the necessary consequence.

XI.

That the court erred in not holding and deciding that the navigators of the "Svea" were in fault for stubbornly persisting with course and speed until it was too late to do anything to avoid the collision.

XII.

That the District Court erred in holding and deciding that the collision was due to sole fault of the Steamship "Newport" and her navigators.

XIII.

That the District Court erred in rendering its decree in the premises against respondent George McKinnon, Master of the "Newport" and in not dismissing the libel as to said respondent.

XIV.

That the court erred in not holding and deciding that the collision between the Steamships "Newport" and the "Svea" was the result of the mutual fault of said vessels.

XV.

That the Court erred in not directing a division of the damages according to the usual practice in cases of collision between vessels mutually at fault.

XVI.

That the District Court erred in holding and deciding:

(1) That the second danger signal of four blasts from the "Svea" was blown when the vessels

were within 200 feet of each other and in not holding that said signal was blown when the vessels were three-eighths to one-half mile apart;

(2) That the Master of the "Svea" had no sufficient indication that the "Newport" would fail in her duty until he had rightfully reached a point where he was in extremis;

(3) That if the "Svea" had stopped her engines or changed her course, as contended by the "Newport", the collision would nevertheless have occurred.

Farnham P. Griffiths
McCutchen, Olney, Mannon & Greene
Proctors for Claimant, Respondents, Cross-Libelants and Appellants.

[Endorsed]: No. 1202 Civil. In the Southern Division of the United States District Court for the Northern District of California Third Division. In Admiralty. Henry Wilson, et al., libelants vs. SS "Newport," etc., et al, respondents. Pacific Mail SS Company, claimant, Pacific Mail SS. Company, cross-libelant, vs. Henry Wilson, et al., cross-respondents. Assignment of Errors. Service of the within assignment of errors and receipt of a copy is hereby admitted this 27th day of Apr., 1926 Andros, Hengstler & Dorr, Proctors for Libelants. Filed Apr. 28, 1926. Chas. N. Williams, clerk, by R S Zimmerman deputy clerk. McCutchen, Olney, Mannon & Greene, Balfour Building San Francisco, California.

[Title of Court and Cause.]

NOTICE OF APPEAL

To Libelants and Cross-Respondents above named, and to Messrs. Andros & Hengstler and F. W. Dorr, Esq., and Andros Hengstler & Dorr, their proctors:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE and you are hereby notified that PACIFIC MAIL STEAMSHIP COMPANY, a corporation, claimant of the above named Steamship "NEWPORT" and respondent herein, and respondent (J) GEORGE McKINNON, Master of said vessel, hereby appeal to the next United States Circuit Court of Appeals for the Ninth Circuit from that certain judgment and final decree made and entered herein on the 10th day of March, 1926, and the whole thereof.

Dated: San Francisco, California, April 27th, 1926.

Farnham P. Griffiths
McCutchen, Olney, Mannon & Greene
Proctors for Claimant, Respondents, Cross-Libelant and Appellants.

[Endorsed]: No. 1202 Civil. In the Southern Division of the United States District Court for the Southern District of California, In Admiralty. Henry Wilson, et al., libelants, v. S. S. "Newport" her engines, etc. J. McKinnon, Master of said vessel and Pacific Mail SS Company, a corporation, owner of said vessel, respondents. Pacific Mail S. S. Co. a corporation, claimant, Pacific Mail S. S. Co., a corporation cross-libelant, v. Henry Wilson et al, cross-respondents. Notice of Appeal. Service of the within Notice of Appeal and

receipt of a copy is hereby admitted this 27th day of April, 1926. Andros, Hengstler & Dorr, Proctors for libelant. Filed Apr. 28, 1926. Chas. N. Williams, Clerk by R S Zimmerman, deputy clerk. McCutchen, Olney, Mannon & Greene Balfour Building, San Francisco, California.

[Title of Court and Cause.]

STIPULATION RE RECORD ON APPEAL

IT IS HEREBY STIPULATED that the originals of all exhibits received in evidence at the trial of the above cause may be filed in the Circuit Court of Appeals and that copies of said exhibits may be omitted from the record on appeal of the above cause.

IT IS FURTHER STIPULATED that the testimony taken before the Honorable Francis Krull upon the reference to ascertain and report the damages suffered by libelants, the exhibits offered or received during the hearings upon such reference, and the Commissioner's Report of such damages may be omitted from the Record and Apostles on Appeal of the above cause.

Dated: San Francisco, California, March 15, 1926.

Andros, Hengstler & Dorr
Proctors for Libelants.

Farnham P. Griffiths
McCutchen, Olney, Mannon & Greene
Proctors for Claimant and
Respondents.

It is so ordered, this May 1st 1926

McCormick
District Judge.

[Endorsed]: No 1202 Civil. In the Southern Division of the United States District Court for the Southern District of California. Henry Wilson et al., libelants, vs. SS "Newport" etc. et al, respondents. Pacific Mail SS Company, a corporation, claimant. Pacific Mail SS Company, a corporation, cross-libelant, vs. Henry Wilson, et al, cross-respondents. Stipulation re record on appeal. Filed May 1, 1926. Chas. N. Williams, Clerk, by L. J. Cordes, deputy Clerk. McCutchen, Olney, Mannon & Greene Balfour Building, San Francisco, California.

[Title of Court and Cause.]

STIPULATION RE PRINTING RECORD ON APPEAL

IT IS HEREBY STIPULATED AND AGREED by the parties hereto that in the printing of the record on the appeal of the above entitled cause all captions shall be omitted except the caption of the Libel, Stipulation re Amendment to Libel, Amended Libel, Answer to Libel and Cross-Libel and in the place of such omissions the words "Title of Court and Cause" shall be substituted; also that all verifications shall be omitted, substituting therefor the word "verified"; also that the

original exhibits need not be printed, but may be considered as a part of the record, even though not printed.

Dated: April 27th, 1926.

Andros, Hengstler & Dorr
Proctors for Libelants and Cross-Respondents.

Farnham P. Griffiths
McCutchen, Olney, Mannon & Greene
Proctors for Claimant, Respondents Cross-Libelant and Appellants.

IT IS SO ORDERED:

McCormick
United States District Judge.

Dated Apr. 28th 1926.

[Endorsed]: No. 1202. Civil. In the Southern Division of the United States District Court for the Southern District of California. In Admiralty. Henry Wilson, et al., libelants, v. Steamship "Newport," et al., respondents. Pacific Mail Steamship Company, a corporation, claimant. Pacific Mail Steamship Company, a corporation, cross-libelant, v. Henry Wilson, et al., cross-respondents. Stipulation re printing record on appeal. Filed Apr. 28, 1926. Chas. N. Williams, clerk, by R S Zimmerman deputy clerk. McCutchen, Olney, Mannon & Greene. Balfour Building, San Francisco, California

[Title of Court and Cause.]

BOND FOR COSTS ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS:

That we, PACIFIC MAIL STEAMSHIP COMPANY, a corporation, as Principal, and HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation, as Surety, are held and firmly bound unto Henry Wilson, F. A. Wilson, W. T. Wilson, Lucy W. Kendall, A. Kendall, A. J. Patterson, Jas. Pennycock, O. Bertelsen, J. S. Hutchinson, E. C. Hutchinson, C. E. Allen, A. B. Johnson, Katie M. Johnson, Mariett Johnson, A. Hansen, Clara A. Buchholz, H. W. Jackson, L. Everding, Frank Graham, Margaret A. Wilson, Trustee, Carrie E. Wilson, J. H. Wilson, Margaret A. Wilson, Wm. C. Wilson, James Graham, B. P. Nelson, Karl Rohberg, Charles S. Semsen, James Hayes, C. H. Anderson, Harry Walton, W. Saaris, Gust Anderson, Gust Saarinen, Wm. B. Reilly, Louis Norloff, John McDonald, Wilson Bangay, Robert White, George Dolan, John Lewis, and Sett Strand, their heirs, executors, administrators or assigns, in the sum of Two Hundred Fifty (250) Dollars, to be paid to the aforesaid Henry Wilson, F. A. Wilson, W. T. Wilson, Lucy W. Kendall, A. Kendall, A. J. Patterson, Jas. Pennycock, O. Bertelsen, J. S. Hutchinson, E. C. Hutchinson, C. E. Allen, A. B. Johnson, Katie M. Johnson, Mariett Johnson, A. Hansen, Clara A. Buchholz, H. W. Jackson, L. Everding, Frank Graham, Margaret A. Wilson, Trustee, Carrie E. Wilson, J. H. Wilson, Margaret A. Wilson, Wm. C. Wilson, James Graham, B. P. Nelson, Karl Rohberg, Charles S. Semsen, James Hayes, C. H. Anderson, Harry Walton, W. Saaris, Gust Anderson, Gust Saarinen, Wm. B Reilly, Louis Norloff, John McDonald, Wilson Bangay, Robert White, George Dolan, John Lewis, and Sett Strand, their heirs, executors, administrators or as-

signs, for the payment of which, well and truly to be made, we and each of us, jointly and severally, bind ourselves, our successors and assigns, firmly by these presents.

Sealed with our seals and dated the 27th day of April, 1926.

WHEREAS, claimant and respondent PACIFIC MAIL STEAMSHIP COMPANY, a corporation, and respondent (J) GEORGE McKINNON, appellants, have appealed or are about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree of the United States District Court in and for the Southern Division of the Southern District of California made and entered on the 10th day of March, 1926, in that certain cause entitled Henry Wilson, et al., Libelants, versus the Steamship "Newport" et al., Respondents, No. 1202 Civil of the records of said court, and the whole of said decree:

NOW, THEREFORE, the condition of this obligation is such that if the above named appellants shall prosecute said appeal with effect and pay all costs which may be awarded against them, or either of them, as such appellants, if the appeal is not sustained, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

PACIFIC MAIL STEAMSHIP COMPANY

(SEAL) By A. W. Boldman

Its President

Principal

HARTFORD ACCIDENT AND INDEMNITY COMPANY

By Alfred W. Hillback (SEAL)

Its Attorney in Fact

Surety.

EXAMINED AND RECOMMENDED FOR APPROVAL AS PROVIDED IN RULE 28 this 27th day of April, 1926.

Andros, Hengstler & Dorr
Andros & Hengstler
F. W. Dorr
Proctors for Libelants and
Cross-Respondents.

THE FOREGOING BOND IS HEREBY ALLOWED AND APPROVED THIS 28th day of APRIL, 1926.

McCormick
District Judge.

STATE OF CALIFORNIA)
City and County of San Francisco) ss.

On this 27th day of April in the year one thousand nine hundred and twenty-six, before me, John McCallan a Notary Public in and for said City and County, residing therein, duly commissioned and sworn, personally appeared ALFRED W. HILLBACK, known to me to be the Attorney-in-Fact of the HARTFOFRD ACCIDENT AND INDEMNITY COMPANY, the Corporation described in and that executed the within instrument, and also known to me to be the person.... who executed it on behalf of the Corporation therein named, and ....he.... acknowledged to me that such Corporation executed the same.

(SEAL)

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal, at my office, in the said City and County of San Francisco, the day and year in this certificate first above written.

John McCallan

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires April 12th 1929.

[Endorsed]: No. 1202 Civil In the Southern Division of the United States District Court for the Southern District of California .....Division In Admiralty Henry Wilson, et al., Libelants, vs. Steamship "Newport" her engines, etc., et al., Respondents. Pacific Mail Steamship Company, a corporation, Claimant. Pacific Mail Steamship Company, a corporation, Cross-Libelant, vs. Henry Wilson et al., Cross Respondents. Bond for Costs on Appeal. Filed Apr 28 1926 Chas. N. Williams, Clerk By R. S. Zimmerman Deputy Clerk. McCutchen, Olney, Mannon & Greene Proctors for Pac. Mail SS Co. Balfour Building San Francisco, California

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[Title of Court and Cause.]

PRAECIPE FOR APOSTLES ON APPEAL.

To the Clerk of the above entitled court:

Please prepare the record and apostles on appeal to be filed in this cause in the Office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit and include therein the following:

A—All those papers, documents and data required by Subdivision 1 of Sec. 1 of Rule IV of the Rules in Admiralty of the United States Circuit Court of Appeals for the Ninth Circuit.

B—All the pleadings, together with the exhibits annexed thereto in the above cause, all opinions of the court on questions arising in said cause, the interlocutory and final decrees herein and other documents herein designated; said papers, we understand, being as follows:

1. Libel with annexed interrogatories.
2. Claim of Pacific Mail Steamship Co.
3. Stipulation re amendment to libel
4. Amended libel
5. Answer of claimant and respondents to amended libel, with annexed interrogatories.
6. Cross-libel of Pacific Mail Steamship Company
7. Answer to cross-libel and answers to interrogatories propounded in answer and cross-libel
8. Memorandum opinion dated September 10, 1924.
9. Interlocutory Decree.
10. Final decree.

C—Court minutes of proceedings and orders in the above cause.

D—All testimony, depositions and other proofs adduced in said cause, except the testimony given before the United States Commissioner upon the reference to ascertain and report damages.

E—The original exhibits introduced in evidence in said cause except the exhibits introduced on the hearing before the United States Commissioner on the reference to ascertain and report damages.

F—Notice of appeal.

G—Assignment of errors.

H—Stipulation re record on Appeal.

I—Stipulation re Printing of the record on appeal

J—This pracipe.

In the printing of the above, omit all captions except in the libel, stipulation re amendment to libel, amended libel, and cross-libel, substituting therefor "Title of court and cause" and omit all verifications, substituting therefor the word "verified."

Farnham P. Griffiths
McCutchen, Olney, Mannon & Greene
Proctors for Claimant, Respondents, Cross-Libellants and Appellants.

[Endorsed]: No. 1202 Civil. In the Southern Division of the United States District Court for the Northern District of California. In Admiralty. Henry Wilson et al., libelants, vs. SS "Newport" etc et al., respondents. Pacific Mail SS. Company, a corporation, claimant, Pacific Mail SS. Company, a corporation, cross-libelant, vs. Henry Wilson, et al. Cross-respondents. Praecipe for Apostles on appeal. Service of the within Praceipe for Apostles on Appeal and receipt of a copy is hereby admitted this 27th day of April, 1926. Andros, Hengstler & Dorr Proctors for libelants. Filed Apr. 28, 1926. Chas. N. Williams, Clerk, by R S Zimmerman, deputy clerk. McCutchen, Olney, Mannon & Greene, Balfour Building San Francisco, California

(Title of Court and Cause).

CLERK'S CERTIFICATE.

I, CHAS. N. WILLIAMS, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing volume containing 230 pages numbered from 1 to 230 inclusive, to be the apostles on appeal in the above-entitled cause, as printed by the appellant, and presented to me for comparison and certification and that the same has been compared and corrected by me and contains a full, true and correct transcript of the records and proceedings in the case of Henry Wilson et al., Libelants, vs. Steamship "Newport" et al., Respondents, Pacific Mail Steamship Company, a corporation, Claimant; Pacific Steamship Company, a corporation, Cross-Libelant, vs. Henry Wilson et al., Cross-Libelants, as the same now remain on file and of record in this office, and as called for in praecipe for apostles on appeal on file herein, to-wit:

All those papers, documents and data required by Subdivision 1 of Sec. 1 of Rule IV of the Rules in Admiralty of the United States Circuit Court of Appeals for the Ninth Circuit; all the pleadings, together with the exhibits annexed thereto in the above cause, all opinions of the court on questions arising in said cause; libel with annexed interrogatories; claim of Pacific Mail Steamship Company; stipulation re amendment to libel; amended libel;

answer of claimant and respondents to amended libel with annexed interrogatories; cross-libel of Pacific Mail Steamship Company; answer to cross-libel and answer to interrogatories propounded in answer and cross-libel; memorandum opinion dated September 10, 1924; interlocutory decree; final decree; court minutes of proceedings and orders in the above cause; all testimony, depositions and other proofs adduced in said cause, except the testimony given before the United States Commissioner upon the reference to ascertain and report damages, to-wit: reporter's transcript of testimony and proceedings on trial, deposition of John McKeown, Charles S. Semsen and Carl Rohberg; notice of appeal; assignment of errors; stipulation re record on appeal; stipulation re printing of the record on appeal; bond for costs on appeal and this praecipe.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to $35.30 and that said amount has been paid by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 18 day of June, in the year of our Lord One Thousand Nine Hundred and Twenty-six, and

of our Independence the One Hundred and Fiftieth.

[Seal] CHAS. N. WILLIAMS,
Clerk of the District Court of the United States of America, in and for the Southern District of California.

By R. S. Zimmerman,
Deputy.

[Endorsed]: Printed Apostles on Appeal. Filed July 7, 1926. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

No. 4902

United States

Circuit Court of Appeals

For the Ninth Circuit.

PACIFIC MAIL STEAMSHIP COMPANY, a Corporation, Claimant and Cross-libelant, Steamship "NEWPORT," Her Engines, Boilers, Tackle, etc., J. McKINNON, Master of said Vessel, and PACIFIC MAIL STEAMSHIP COMPANY, a Corporation, Owner of said Vessel, Respondents,

Appellants,

vs.

HENRY WILSON, F. A. WILSON, W. T. WILSON, LUCY W. KENDALL, A. KENDALL, MARY TROWBRIDGE, Administratrix of the Estate of A. J. PATTERSON, Deceased, JAMES PENNYCOCK, O. BERTELSEN, J. S. HUTCHINSON, E. C. HUTCHINSON, HELENA ALLEN, A. B. JOHNSON, KATIE M. JOHNSON, MARIETT JOHNSON, A. HANSEN, CLARA A. BUCHHOLZ, H. W. JACKSON, L. EVERDING, FRANK GRAHAM, MARGARET A. WILSON, Trustee, CARRIE E. WILSON, J. H. WILSON, MARGARET A. WILSON, WM. C. WILSON, JAMES GRAHAM, B. P. NELSON, KARL ROHBERG, CHARLES S. SEMSEN, JAMES HAYES, C. H. ANDERSON, HARRY WALTON, W. SARRIS, GUST ANDERSON, GUST SAARINEN, WM. R. REILLY, LOUIS NORLOFF, JOHN McDONALD, WILSON BANGAY, ROBERT WHITE, GEORGE DOLAN, JOHN LEWIS, SETT STRAND, Libelants,

HENRY WILSON, F. A. WILSON, W. T. WILSON, LUCY W. KENDALL, A. KENDALL, MARY TROWBRIDGE, JAMES PENNYCOCK, O. BERTELSEN, J. S. HUTCHINSON, E. C. HUTCHINSON, HELENA ALLEN, A. B. JOHNSON, KATIE M. JOHNSON, MARIETT JOHNSON, A. HANSEN, CLARA A. BUCHHOLZ, H. W. JACKSON, L. EVERDING, FRANK GRAHAM, MARGARET A. WILSON, Trustee, CARRIE E. WILSON, J. H. WILSON, MARGARET A. WILSON, WM. C. WILSON, JAMES GRAHAM, and B. P. NELSON, Cross-respondents,

Appellees.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October Term, A. D. 1926, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the city and county of San Francisco, in the State of California, on Monday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-six. Present: Honorable WILLIAM H. HUNT, Circuit Judge, Presiding; Honorable FRANK H. RUDKIN, Circuit Judge, Honorable ADOLPHUS F. ST. SURE, District Judge.

[Title of Cause and Number.]

ORDER OF SUBMISSION.

ORDERED appeal in the above-entitled cause argued by Mr. Farnham P. Griffiths, proctor for the appellants, and by Mr. Frederick W. Dorr, proctor for the appellees, and submitted to the Court for consideration and decision.

At a stated term, to wit, the October Term, A. D. 1926, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the city and county of San Francisco, in the State of California, on Monday, the first day of November, in the year of our Lord one thousand nine hundred and twenty-six. Present: Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable WILLIAM H. HUNT, Circuit Judge, Honorable FRANK H. RUDKIN, Circuit Judge.

[Title of Cause and Number.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE.

By direction of the Honorable William H. Hunt and Frank H. Rudkin, Circuit Judges, and Adolphus F. St. Sure, District Judge, and good cause therefor appearing, ORDERED that the typewritten opinion this day rendered by this Court in the above-entitled cause be forthwith filed by the Clerk, and that a decree be filed and recorded in the minutes of this court in accordance with the opinion filed therein.

[Title of Cause and Number.]

OPINION U. S. CIRCUIT COURT OF APPEALS.

Before HUNT and RUDKIN, Circuit Judges. and ST. SURE, District Judge:

HUNT, Circuit Judge:

In a calm sea on a clear bright morning in November, 1922, about twelve miles off the coast of California near Point Buchon, the steamship "Newport," 337 feet long, south bound, collided with the steam schooner "Svea," 170 feet long, bound north. The "Svea" interests libeled and the "Newport" interests cross-libeled. The "Newport" admitted fault but assumed that the "Svea" was also at fault. The "Svea" denied fault and set up that the collision was due solely to the fault of the "Newpart."

The District Court held that the collision was due to the negligence and fault of the "Newport" and that the plea of contributory negligence on the part of the "Svea" was not substantiated. Decree was entered against the "Newport" and her owners, Pacific Mail Steamship Company, and McKinnon, her master. The Steamship Company, claimant of the "Newport," and McKinnon, her master, appeal, contending that the decree should be based upon mutual fault and that the captain of the "Newport" should be exonerated.

The vessels approached from converging courses and were in sight of each other from the time they

were about eight miles apart. The crossing courses were such that the "Newport" held the "Svea" on her right side about three points off her starboard bow. The "Svea" had the "Newport" about three points off her port bow. There was no change of bearings from the time the vessels saw one another. The full speed of the "Newport" was ten knots, and that of the "Svea" seven and a half knots. The collision was at about right angles, the stem of the "Newport" striking the "Svea" amidships on the port side. Both ships were badly damaged.

It is admitted that there was plain fault on the part of the "Newport," the burdened ship. (Article 19, International Rules, 26 Stat. 327). Her master left the bridge and went to the lavatory before he saw the "Svea." The third officer remained in charge. Just before the collision the master heard the whistle, and looking through a port-hole, saw the "Svea." He went at once to the bridge, found the engines full speed astern, but was too late to do anything to avert the collision.

When the ships were about three miles apart with unchanged bearings, the mate of the "Svea" remarked to the captain, "I wonder what she is going to do." The captain replied: "I think he knows the rules of the road," and kept his course and speed. After the "Svea" had gone another mile and the ships were about two miles apart, with unchanged bearings, the master of the "Svea" blew one whistle which called for passing port to port. Although the whistle could have been heard

two or more miles away, the "Newport" made no response. The mate of the "Svea," using his glasses, saw no one on the bridge of the "Newport" and so reported to the master. The ships proceeded on their courses with unaltered speed until they were a little over a mile apart. The captain of the "Svea" then gave a danger signal of four blasts and kept his course and speed. No response came from the "Newport." The ships were approaching closer and closer, the bearings remaining unchanged. As the vessels proceeded to a point about three-eighths of a mile apart, the captain of the "Svea," seeing no activity on the bridge of the "Newport," blew a second danger signal. Still no reply from the "Newport," and still the ships proceeded without changing their courses and speeds. Immediately before the collision the mate of the "Svea" sung out, "Hard aport." The master testified that he did not countermand that order because the ships were not far apart and believing that collision was then inevitable, by following the order the "Svea" would strike in a straight, instead of a slanting way. When asked whether at the time of the giving of the order to hard aport there was any chance to avoid the collision, he replied, "No, not on my side." His testimony was that when he blew the second danger signal and the ships were coming close together, there was plenty of time for the "Newport" to clear the "Svea"; that when he realized that the "Newport" was not going to do anything, the ships were only about a length apart; that if he had then reversed his en-

gines he would have rammed into the "Newport" amidships; that after he blew his last danger signal he considered whether or not he should stop the "Svea" or back, but that he decided to go ahead, beleiving the "Newport" would change and knowing that the "Svea" had the right of way; that if he had stopped or slackened speed or reversed in an effort to avoid collision and the "Newport" at the same time had ported her helm, there would have been a collision. On cross-examination he said that when the ships were over a quarter of a mile apart he concluded *that he acted* there would be some mistake and that it was best to keep his course and speed; that he did not know what the "Newport" was going to do; that he doubted what she was going to do; that he knew what the duty of the "Newport" was and that there was a chance for her to go clear.

While the argument that the "Svea" as the holding on vessel, was under a primary duty to keep her course and speed (Article XXI), and that it was the duty of the "Newport" to keep out of her way, is sound as far as it is applicable, nevertheless, as we held in the West Hartland Case, 2 F. (2) 834, the duty imposed upon the "Svea" did not relieve her of the responsibility of deciding if and when it was necessary to depart from the rule in order to avoid immediate danger. Like many other rules, it is to be observed having due regard to the dangers of the situation and "to any special circumstance which may arise in any particular case rendering any departure from them necessary to avoid

immediate danger." (The Sunnyside, 91 U. S. 208; Art. XXVII, Gen. Prudential Rules.)

In The Delaware, 161 U. S. 459, the Court held that the preferred steamer would not be held in fault for maintaining her course and speed so long as it is possible to avoid her by porting; at least, in the absence of some indication that she is about to fail in her duty.

In The New York, 175 U. S. 187, where a like view was expressed, the case arose under the old rules which required both vessels to slacken speed and reverse if necessary to avoid collision, but it is none the less pertinent as to the general duty to adopt proper precaution to prevent collision.

In The Devonian, 110 Fed. 588, Judge Lowell said that the duty of the privileged vessel is to hold her course and of the burdened vessel to keep off that course, but that the privileged ship should constantly observe the burdened one in order to note whether the latter fails in her duty, and that when the failure of the burdened vessel becomes apparent, the privileged vessel must change her course as prudence demands.

The principal upon which the cases cited rest must control. The mate of the "Svea" saw no one on the bridge of the "Newport"; the captain and the mate were concerned for they knew that if the courses were kept collision was inevitable. When the ships were two miles apart the situation "did not look very good" to the captain of the "Svea"; a signal of one blast at two miles was not answered. A danger signal at one mile and a second danger

signal at three-eighths of a mile were unanswered, and never any change in the course of the "Newport."

The fact that the "Newport" failed to manoeuver immediately after the last signal from the "Svea," when considered with the immediately antecedent facts and circumstances as already outlined, made it distinctly apparent, we think, that she intended to persist in her course and thus made the danger of collision manifest. It therefore became the duty of the "Svea" to yield adherence to the primary right to hold her course and speed, and to do what she could to avoid disaster. Mariners of long experience testified that in their judgment the conduct of the "Newport" clearly indicated that she did not intend to change her course and that the "Svea" should have been stopped when the "Newport" was from three-eighths to a half a mile away.

It is contended that the decree holding the master of the "Newport" personally liable is erroneous. Accept it that the evidence excuses the master from personal negligence and the question is, should he be held responsible for the negligence of his subordinate officer, the mate, whom he left in charge when he went to the lavatory.

The captain testified that when he went to the bridge the excuse given by the mate for not avoiding the "Svea" was that he did not see her. The captain was then asked whether or not he had given instructions to his officers about standing watch on the bridge, to which he replied that at the time of

the collision the third officer was keeping his first watch on the ship; that he had shipped the day before and was making his first voyage.

In Wilson vs. The Belvedere, 30 Fed. Cas. 106, the Court, in referring to the duties of a master, said: "Masters often attempt to fix the sole responsibility on mates to screen themselves, who, of all others, should constantly exercise the most care and marked attention. If their engagements in other duties, or their avocations throw on the mates the executive duties, they being (though approved by the owners) selected by the masters and their deputies, the master must share the responsibility when casualties occur." Nicholson et al. vs. Mouncey et al., 15 East. 384, decided in 1812, distinguished between the liability of a captain of a ship of war and the captain of a merchant ship. Lord Ellenborough pointed out that the captain of a ship of war had no power to appoint the officers and crew on board and that the captain himself was not a volunteer but was obliged to serve and to take the persons whom he found on board and make the best of them, whereas the owner or master of a merchant ship is answerable for those whom he employs for injuries done by them to others within the scope of their employment.

Spencer on Collisions, section 182, writes that the party injured by collision may not only look to the vessel inflicting damages to the extent of its actual value, and to its owners to the extent of their interests, but to the master, and that the master is not only responsible for his own conduct, but also

for the conduct of his crew. In Sherman and Redfield on Negligence, 6th Ed. 246, it is said that under the rules peculiar to mercantile law the master of a private ship is responsible to third persons for his own negligence to the fullest extent and for the negligence of all employed on board to the same extent as if he were the ultimate principal. Marsden on Collisions at Sea, cites Denison vs. Seymour, 9 Wend. 9, in support of the text that a master has been held liable for the negligent and wrongful acts of his crew as well as for his own act. In the case referred to the Court reasoned that a captain of a merchant ship is not bound to engage in the service, but if he does he takes the position with the responsibility incident to his employment, and that, inasmuch as he appoints the mates, he is generally responsible for their negligence.

Kennedy vs. Ryall, 67 N. Y. 379, directly presented the question how far a master of a ship is answerable for damages arising by reason of the negligence of those employed under him. The defendant was in command of a steamship at quarantine which the deputy health officer ordered to be fumigated. By order of the health officer the steward cleared the passengers from the steerage and certain utensils containing poison were placed in the steerage for purposes of fumigation. Directions were given by the health officer as to the time the steerage should remain closed and as to the removal of the utensils. A drinking cup was not removed and the plaintiff's intestate, a child, who had been ordered by the steward to return to the

steerage, drank some of the poison an ddied as a result. The Court held that the steward, so far as he attended to the removal of the poison and the reinstatement of the steerage, was apparently acting within the general scope of his duty, and it was assumed that he did act with the approval of his superior officers. It was said that to all intents and purposes the steward became a servant of the master of the ship, acting for him and on his behalf; "That officer," said the Court, "was in command of the vessel and it was under his control and subject to his general management and direction—at least until the completion of the voyage and it was safely in port. By a rule peculiar to the mercantile law the master is liable for the negligent acts of the employee while engaged under his authority to the same extent as if he were the ultimate principal, who is ordinarily bound to respond in damages for such negligence." The master was held liable for the act of the chief steward in not removing the cup and poison which were the cause of the death of the child.

Story on Agency, sec. 315, wrote that the policy of the maritime law has "indissolubly connected" the personal responsibility of the master with that of all the other persons on board who are under his command and are subjected to his authority. He put the foundation of that liability upon the rule established by early primary authorities that in maritime law the master is treated not merely as an agent in his own behalf as well as in behalf of the owner, but as, in a way, a subrogated prin-

cipal and qualified owner having authority for the time being. Story gives as an additional reason for putting responsibility upon the master for his officers and crew, that the master, by reason of the responsibility, is induced to exercise superior watchfulness over the acts and conduct of his subordinates.

Judge Addison Brown in The City of New York, 25 Fed. 149, held the same way, saying: "In modern maritime law so far as I can discover the liability for injuries through negligence is confined to the owners of the ship and to the master, who is responsible for all his subordinates that are appointed by him and are under his control; and that is the general rule in English and American law." (Kay on Shipmasters and Seamen, Vol. II, p. 1153.)

Counsel for the master of the "Newport" cite The Rebecca, 20 Fed. Cas. No. 11,619, decided in 1831. Judge Ware there referred to the fact that in early maritime jurisprudence the master was usually part owner of the ship and was not dealt with as an agent of the owner, whereas under modern conditions the authority of the master is more that of a stipendiary agent or praepositus of the owner, and held that under the altered relationship there should be a reversal of ancient customs as to the master's liability. There is force in the reasoning but it does not seem to have been sufficiently cogent to persuade text-writers and courts to break the more ancient and stricter doctrine of the maritime law.

Our conclusion is that upon the authority of the cases cited the master was properly held liable for the inexcusable negligence of the third officer.

The decree must be reversed with directions to enter a decree based upon mutual fault, with the usual apportionment of damages of cross-liability in admiralty. Costs in this court and in the court below to be equally divided.

Reversed.

[Endorsed]: Opinion. Filed Nov. 1, 1926. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 4902.

PACIFIC MAIL STEAMSHIP COMPANY, a Corporation, et al.,

Appellants,

vs.

HENRY WILSON et al.,

Appellees.

DECREE.

Appeal from the District Court of the United States for the Southern District of California, Southern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United

States for the Southern District of California, Southern Division, and was duly submitted:

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, reversed, and that this cause be, and hereby is remanded to the said District Court with directions to enter a decree based upon mutual fault, costs in this court and in the said District Court to be equally divided.

[Endorsed]: Decree. Filed and entered November 1, 1926. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

[Title of Cause and Number.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 35 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, F. D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify that the foregoing two hundred and fifty (250) pages, numbered from and including 1 to and including 250, to be a full, true and correct copy of the entire record, excluding original exhibits, of the above-entitled cause in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellees, and certified under Rule 35 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 15th day of November, A. D. 1926.

[Seal]

F. D. MONCKTON,
Clerk.

By Paul P. O'Brien,
Deputy Clerk.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1927

No. 146

HENRY WILSON, F. A. WILSON, W. T. WILSON, et al., Petitioners,

vs.

PACIFIC MAIL STEAMSHIP COMPANY, STEAMSHIP "NEWPORT," HER ENGINES, etc., J. McKINNON, Master, etc.

ORDER ALLOWING CERTIORARI—Filed January 10, 1927

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1927

No. 173

PACIFIC MAIL STEAMSHIP COMPANY, Claimant of the STEAMSHIP "NEWPORT," HER ENGINES, etc., et al., Petitioners,

vs.

HENRY WILSON, F. A. WILSON, W. T. WILSON, et al.

ORDER ALLOWING CERTIORARI—Filed March 14, 1927

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1927

No. 146

HENRY WILSON, F. A. WILSON, W. T. WILSON, LUCY W. KENDALL, A. KENDALL, MARY TROWBRIDGE, administratrix of the estate of A. J. Patterson, deceased, JAMES PENNYCOCK, O. BERTELSEN, J. S. HUTCHINSON, E. C. HUTCHINSON, HELENA ALLEN, A. B. JOHNSON, KATIE M. JOHNSON, MARIETT JOHNSON, A. HANSEN, CLARA A. BUCHHOLZ, H. W. JACKSON, L. EVERDING, FRANK GRAHAM, MARGARET A. WILSON, trustee, CARRIE E. WILSON, J. H. WILSON, MARGARET A. WILSON, WM. C. WILSON, JAMES GRAHAM, B. P. NELSON (libelants and cross-respondents), KARL ROHBERG, CHARLES S. SEMSEN, JAMES HAYES, C. H. ANDERSON, HARRY WALTON, W. SARRIS, GUST ANDERSON, GUST SAARINEN, WM. R. REILLY, LOUIS NORLOFF, JOHN MCDONALD, WILSON BANGAY, ROBERT WHITE, GEORGE DOLAN, JOHN LEWIS, SETT STRAND (libelants), *Petitioners,*

vs.

PACIFIC MAIL STEAMSHIP COMPANY (a corporation), (respondent, claimant and cross-libelant), steamship "NEWPORT", her engines, boilers, tackle, etc., J. MCKINNON, Master of said vessel, *Respondents.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONERS.

INTRODUCTORY STATEMENT.

This is a libel in admiralty filed by petitioners, owners of the steamship "Svea", and a cross-libel by Pacific Mail Steamship Company, owner of the steamship "Newport", to recover damages for a collision between these vessels which occurred at 9:53 A. M. in the morning of November 29, 1922, off the coast of California.

The United States District Court for the Southern District of California decided that the collision was due solely to the gross negligence and plain fault of the "Newport"; that the plea of contributory negligence on the part of the "Svea" was not sustained by a preponderance of the evidence, and that the half-damage-rule was not applicable. The opinion of the District Court is reported in 1924 Am. Mar. Cases, p. 1285, and may also be found on page 63 of the transcript.

The United States Circuit Court of Appeals for the Ninth Circuit reversed the judgment of the lower court, and ordered a decree based upon mutual fault. The opinion of the Circuit Court of Appeals is reported in 15 Fed. (2nd) 342, and may also be found on page 239 of the transcript.

A writ of certiorari was granted by the court on the 10th day of January, 1927.

I. STATEMENT OF THE CASE.

A. THE SALIENT FACTS.

The collision between the "Newport", an iron passenger steamship carrying many passengers, and the "Svea", a wooden lumber steam schooner, occurred in broad daylight on the Pacific Ocean along the coast of California. The vessels were on *crossing courses.* The "Newport" had the "Svea" on her starboard side and was required by the International Rules* to *"keep out of the way of the other"* (Article 19); the "Svea" was required by the same rules to *"keep her course and speed".* (Article 21.)

It is admitted that the "Newport", without excuse, did *not* keep out of the way of the "Svea", and did *not* do any of the specific acts required by the rules, viz., "avoid crossing ahead of the other" (Article 22); "slacken her speed or stop or reverse". (Article 23.) It is also admitted that the "Svea" did keep her course and speed in accordance with Article 21.

The vessels were in sight of each other from the time when they were about eight miles apart. The "Newport" was proceeding in a roughly easterly direction (south 79° east magnetic), with a speed of nine to ten knots an hour, the "Svea" in a roughly northerly direction (NW x N½ N magnetic), with a speed of about seven and one-half knots. The master and mate of the "Svea" were watching the approaching "Newport", expecting an indication as to what she was going to do to keep out of the way of the "Svea". When the vessels were about two miles

*Act of Cong. Aug. 19, 1890, ch. 802, 26 Stat. L. 320, as amended by Act of Cong. May 28, 1894, ch. 83, 28 Stat. L. 83.

apart, and the "Newport" had given no indication by signal how she proposed to avoid the "Svea", but had apparently kept her course and speed, the "Svea" blew one whistle indicating that she was keeping her course and speed as required by law. Both ships then proceeded on their courses with unaltered speed until they were a little over a mile apart. As the "Newport" had given no signal, the "Svea" gave a danger signal, keeping her course and speed. When the vessels had proceeded until they were about three-eighths of a mile apart, bearings still being unchanged, and the expected notification not coming from the "Newport", the "Svea" blew a second danger signal.

At this stage it was still possible for the "Newport" to avoid the "Svea" by porting, or by slackening her speed, or stopping, or reversing. The master and mate kept anxiously watching for signals or appropriate movements from the "Newport", knowing that she still had plenty of time to clear the "Svea", and expecting "that the other man might port his helm, or stop and back, or clear me; I did not consider which way, but I considered that he would clear me in some shape or other." (R. 213.) The "Newport" was "an easily handling ship", and, according to the testimony of her master, would begin to change her course within five or ten seconds after putting the wheel over, before she had gone a ship-length (R. 123, 124); it therefore *remained possible for the "Newport" to avoid the "Svea" by her own maneuvers until the vessels were about a ship-*

length apart. The master of the "Svea" testified, his testimony being uncontradicted:

> "That when he blew the second danger signal and the ships were coming close together, *there was plenty of time for the 'Newport' to clear the 'Svea';* * * * that after he blew his last danger signal he considered whether or not he should stop the 'Svea' or back, but that he decided to go ahead, *believing that the 'Newport' would change* and knowing that the 'Svea' had the right of way; that if he had stopped or slackened speed or reversed in an effort to avoid collision and the 'Newport' at the same time had ported her helm, there would have been a collision. On cross-examination he said that when the ships were over a quarter of a mile apart he concluded that (if) he acted there would be some mistake and that it was best to keep his course and speed; that *he did not know what the 'Newport' was going to do; that he doubted what she was going to do; that he knew what the duty of the 'Newport' was and that there was a chance for her to go clear.*"
>
> (Opinion of Circuit Court of Appeals, R. 241, 242.*)

The trial court found:

> "The 'Svea' first realized that the 'Newport' was not going to do anything *when the ships were but two hundred feet apart, and nothing could thereafter have been done by the 'Svea' which would have prevented or avoided the collision* with the 'Newport'. I am satisfied from the evidence and from the testimony of the Master of the 'Svea' that he was always uncertain as to the activities of the 'Newport' and as to those in charge of her navigation, * * * . The evidence of the Master of the 'Svea' convinces me that *he had no distinct, clear and unmistakable indica-*

*Italics ours.

tion that the 'Newport' would fail in her duty until he had rightfully reached a point where he was in extremis and where probably a collision was unavoidable, and I am also satisfied that he then exercised his best judgment, to strictly comply with the rule." (R. 65-66.)

The master of the "Svea" testified, without contradiction:

"After I blew the second four blasts *there was plenty of time for them to act*, and plenty of time for me to act, *if I was given some signals.*" (R. 203.)

When the ships were about two hundred feet apart, and the master of the "Svea" first realized that the "Newport" was not going to do anything, he put his helm hard aport to ease the blow. (R. 203.) The engines of the "Newport", just before the collision, "were going full speed astern." (R. 122.) The stem of the "Newport" struck the "Svea" at about right angles, on the port side about eighty feet forward of the stern, damaging her so that she later capsized.

B. THE QUESTION.

The question arises under the principles of law upon which the decision of the Circuit Court of Appeals rests. We believe these principles to be erroneous and in conflict with the settled law as declared by this court.

The Circuit Court of Appeals said:

1. "While the argument that the 'Svea' as the holding-on vessel, was under a primary duty to

keep her course and speed (article XXI), and that it was the duty of the 'Newport' to keep out of her way, is sound as far as it is applicable, nevertheless, as we held in the West Hartland Case, 2 F. (2) 834, the duty imposed upon the 'Svea' did not relieve her of the responsibility of deciding if and when it was necessary to depart from the rule in order to avoid immediate danger." (R. 242.)

2. "The fact that the 'Newport' failed to manoeuver immediately after the last signal from the 'Svea', when considered with the immediately antecedent facts and circumstances as already outlined, made it distinctly apparent, we think, that she intended to persist in her course and thus made the danger of collision manifest. It therefore became the duty of the 'Svea' to yield adherence to the primary right to hold her course and speed, and to do what she could to avoid disaster." (R. 244.)

C. PETITIONERS' CONTENTIONS.

The contentions of petitioners were upheld by the District Court and are discussed in its opinion. (R. 63-68.) They differ from the views of the Circuit Court of Appeals *toto caelo* and may be summarized as follows:

First: The responsibility of deciding if and when it becomes necessary for the hold-on* vessel to depart from her duty of holding her course and speed arises only in two cases, viz.:

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*In this brief we will refer to a vessel in the position of the "Svea" as the "hold-on" vessel, and a vessel in the position of the "Newport" as the "give-way" vessel, to correspond to their respective duties under the rules.

1. If and after the give-way vessel has given a distinct indication that she is about to fail in her duty.

2. In the absence of such distinct indication: if and after it has become impossible for the give-way vessel to avoid the hold-on vessel.

Concretely: The "Svea" was responsible for a decision as to whether it was necessary for her to depart from the rule only if the facts show that the "Newport" gave a distinct indication that she was about to fail in her duty; or, in the absence of such distinct indication, only after it had become impossible for the "Newport" to avoid the "Svea".

Second: The doctrine of the Circuit Court of Appeals, enunciated in the "West Hartland" case and followed in the instant case, is contrary to the settled law of the Supreme Court in that it requires the hold-on vessel to depart from the rules when and because her master *is in doubt* as to the navigation of the give-way vessel, although the give-way vessel has given no distinct indication that she is about to fail in her duty.

Third: The fact that the give-way vessel fails to maneuver, or continues her course and speed during the period while it is possible for her to avoid the hold-on vessel is not such a distinct indication that the give-way vessel is about to fail in her duty as is required under the rule of the Supreme Court.

Concretely: The fact that the "Newport" failed to maneuver immediately after the last signal from the "Svea", when considered with the immediately

antecedent facts and circumstances, was not such a distinct indication that the "Newport" was about to fail in her duty as was required by the rule of the Supreme Court.

Fourth: The "Svea" had at no time a distinct indication that the "Newport" was about to fail in her duty. Until the two ships were in extremis, the master of the "Svea" remained in doubt as to the intentions of the "Newport", expecting until the last moment that she would comply with the law and take the proper steps to avoid his vessel.

Fifth: It was possible for the "Newport" to avoid the "Svea" down to the moment when the vessels had reached a position where they were only a ship's length apart. Down to this moment, and until the vessels had reached this proximity the "Svea" was required by settled law to hold her course and speed.

We proceed to show that petitioners' contentions are in accord with the settled law as declared by this court, whereas the decision of the Circuit Court of Appeals is in conflict with that law.

II. THE ARGUMENT.

A. THE INTERNATIONAL RULES APPLICABLE.

The present International Rules were adopted in 1890, at an international marine conference held at Washington. Prior to their adoption the rules applicable to ships on crossing courses were different, *both ships* being formerly required to change course

and speed, if necessary, to avoid collision.* Under the present rules one of the ships (the hold-on vessel) is under an imperative obligation to keep her course and speed so as to enable the other (the give-way vessel) to understand the present and future movements of the other and take the proper measures to avoid collision with her. The applicable present rules are:

> *Article 19:* "When two steam-vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side *shall keep out of the way* of the other."
>
> *Article 21:* "Where, by any of these rules, one of two vessels is to keep out of the way *the other shall keep her course and speed.*"
>
> "Note. When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision. (See articles twenty-seven and twenty-nine.)"
>
> *Article 22:* "Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other."
>
> *Article 23:* "Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse."

The primary duties which these rules impose upon the "Newport", having the "Svea" on her own starboard, are the following:

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*"This great change in the rule renders it necessary to be circumspect in citing cases arising before the change, as many vessels might have been obliged to stop and back then which would not be required to do so now. A privileged vessel, which stops and backs now, unless at the last moment as a desperate effort to avert certain collision, would commit a fault, instead of obeying the law."

(*Hughes, Admiralty,* (2d ed.) p. 284.)

a. The absolute duty to keep out of the way of the "Svea". (Art. 19.)

b. The absolute duty to avoid crossing ahead of the "Svea". (Art. 22.)

c. The contingent duty to slacken her speed or stop or reverse. (Art. 23.)

The undisputed evidence shows that the "Newport" violated every one of these duties.

The primary duties which the rules impose upon the "Svea" are the following:

a. The absolute duty to keep her course and speed. (Art. 21.)

b. The contingent duty to take such action as will best aid to avert collision when the "Newport" came so close that collision *could not be avoided by the action of the "Newport" alone.* (Note to Art. 21.)

The undisputed evidence shows that the "Svea" performed all these duties, but she is charged with having adhered too long to her primary duty to hold her course and speed.

In this connection it is well to recall the warning of the court in *The Breakwater,* 155 U. S. 252, 264:

> "Where rules of this description are adopted for the guidance of seamen who are unlearned in the law and unaccustomed to nice distinctions, exceptions should be admitted with great caution, and only when imperatively required by the special circumstances mentioned in rule 24, which may exist in any particular case, rendering a departure from them necessary in order to avoid immediate danger. The moment the observance or non-observance of a rule becomes a matter of doubt or discretion, there is manifest danger, for

the judgment of one pilot may lead him to observe the rule, while that of the other may lead him to disregard it."

B. THE TRUE OBJECT OF ARTICLE 21: THE "SVEA'S" DUTY TO KEEP COURSE AND SPEED.

The Circuit Court of Appeals condemns the hold-on vessel for "adherence to the primary right to hold her course and speed." In fact, however, the situation of the two vessels does not involve the question: What was the *right* of the "Svea"? but rather involves the question: What was her *duty* under the circumstances? This distinction seems to us of fundamental importance; for the stubborn adherence to a right is prima facie blameworthy, whereas the steadfast performance of a duty is prima facie laudable. The theory that the master of the hold-on vessel, while holding course and speed, insists upon the exercise of a right, makes it easier to condemn him, than the theory that he submits to a duty which may be disagreeable and exciting. The true view of the situation is, that both vessels have distinct legal obligations; neither the one nor the other is "privileged" in any proper sense, but each one is "burdened" with duties. That this view is the correct one appears from the language of the rule itself: "*shall* keep her course and speed." This is as imperative a duty as the duty of the other vessel that it "*shall* keep out of the way."

In *The Delaware,* 161 U. S. 459, 468, the court said:

> "That her primary *duty* is to keep her course is beyond all controversy."

E. THE RULE APPLIED BY THE CIRCUIT COURT OF APPEALS.

The Circuit Court of Appeals stated the law of the case as follows:

> "In The Delaware, 161 U. S. 459, the court held that the preferred steamer would not be held in fault for maintaining her course and speed so long as it is possible to avoid her by porting; at least, in the absence of *some indication* that she is about to fail in her duty." (R. 243.)

The above excerpt shows clearly the departure of the Circuit Court of Appeals from the rule announced by this court in *The Delaware.* This court held that a *distinct* indication was the test, while the Circuit Court of Appeals erroneously interpreted *The Delaware* as holding that *some* indication would require the hold-on vessel to change courses.

This departure from the rule is extremely important, because under *The Delaware,* and other decisions which we will discuss, the maneuvers of the "Newport" did not convey a "distinct indication" to the "Svea", which would require her to change her course.

The Circuit Court of Appeals also found that:

> "The fact that the 'Newport' failed to maneuver immediately after the last signal from the 'Svea', when considered with the immediately antecedent facts and circumstances as already outlined, made it *distinctly apparent, we think,* that she intended to persist in her course * * * ." (R. 244.)

The theory of the Circuit Court of Appeals appears to be therefore that, if the actions of the give-way

vessel make it distinctly *apparent* that she intended to persist in her course, it was the duty of the hold-on vessel to abandon the primary duty of keeping her course and speed.

The case of *The West Hartland,* 2 F. (2d) 834, referred to in the opinion of the Circuit Court of Appeals, throws light upon the meaning which the court attaches to the words "distinctly apparent". There, the court said:

> "For some considerable time before the collision, the master of the West Hartland *was in doubt* as to the course the Governor intended to pursue, and *under such circumstances* it was his plain duty to solve that doubt in favor of safety by giving a danger signal or taking timely steps to avoid a collision * * * ."

In other words the theory of the Circuit Court of Appeals is that the hold-on vessel must abandon her duty to hold her course and speed when her master is *in doubt* as to the course of the give-way vessel.

We contend that, while he is in that frame of mind, he merely speculates upon the possibility of the give-way vessel failing to do her duty, and that a rule permitting him to act upon such speculations "would bring about more collisions than it would prevent."

A finding that the activities of the "Newport" *"made it distinctly apparent, we think,* that she intended to persist in her course" is not sufficient to support a finding of fact that there was even *"some* indication that she was about to fail in her duty"; but under the settled law of *The Delaware*

the latter finding would be insufficient; for there must be a "*distinct* indication."

F. THE CIRCUIT COURT OF APPEALS WAS IN ERROR IN HOLDING THAT THE ASSUMED FACT THAT THE FAILURE OF THE "NEWPORT" BECAME "DISTINCTLY APPARENT" TO THE MASTER OF THE "SVEA" SATISFIES THE REQUIREMENTS OF THE RULE OF THE DELAWARE CASE.

The District Court decided that the "Svea" was not in fault for maintaining her course and speed, because it was always possible for the "Newport" to avoid her, and because the "Newport" gave no distinct indication that she was about to fail in her duty.

The Circuit Court of Appeals decided that the "Svea" was in fault for maintaining her course and speed, because the facts made it distinctly apparent that the "Newport" intended to persist in her course.

We contend that the decision of the District Court is within the *Delaware* rule, but the decision of the Circuit Court of Appeals is in conflict with that rule, in this respect: We grant for the sake of argument that the facts made it distinctly apparent to the master of the "Svea" that the "Newport" intended to persist in her course, but contend that, even on that assumption, his mind was still in that condition of doubt and speculation in which the rule of the Supreme Court prohibits him from changing his course and speed. We reserve, however, the important point that it never became distinctly apparent to the master of the "Svea" that the "Newport" intended to persist in her course, but that "he was always *uncertain*

as to the activities of the 'Newport' ". (Finding of the District Court, R. 65), and that he "considered that he would clear me in some shape or other." (R. 213.)

The grammatical meaning of the word "apparent", the meaning which the Circuit Court of Appeals attaches to it in its opinion, and the meaning given to it by respondent in its argument are identical. They all agree that, as long as the intention of an actor is "apparent" to the observer, the latter is still in doubt.

The Standard Dictionary, under the heading "apparent", gives the following definition:

> "Apparent indicates less assurance than probable, and more than seeming. A man's probable intent we believe will prove to be his real intent; his seeming intent we believe to be a sham; his apparent intent *may be* the true one, though we have not yet evidence on which to pronounce with certainty or even with confidence."

The *Delaware* rule forbade the "Svea" from changing course and speed as long as her master thought: "His apparent intent may be the true one, but I am not sure, I am in doubt."

We have already shown that the Circuit Court of Appeals understands, by using the word "apparent", that the observer must act when he is in doubt; that he must resolve such doubt in favor of safety.

Here, then, is the clear-cut issue between the parties: Respondents contend, and the Circuit Court of Appeals holds that "distinct indication" and "doubt" are identical in this connection; that, when

the Supreme Court laid down the *Delaware* rule, that the master of the hold-on vessel will not be held at fault for holding on as long as he has no distinct indication, it intended to rule that the master will be held at fault for holding on when he is in doubt as to the course of the give-way vessel.

Such a contention is, of course, greatly facilitated by omitting the word "distinct" from the language of *The Delaware* opinion and substituting therefor the word "some"; but it is obvious that "some indication" and "distinct indication" are not synonymous terms.

The rule of the *Delaware* contains a distinct warning against the "terrible doubt of appearances", which the poet applies to all speculations, but which is particularly applicable to the case where the lawful actor is sought to be condemned by the confessed wrongdoer for not violating his primary duty.

The same warning is given by Scrutton, L. J., in *The Orduna,* 14 Asp. 574, 577 (Court of Appeal, 1919):

> "It strikes me as very hard to find the stand-on ship to blame because, when the other ship is *apparently* going to break the rules, the stand-on ship does not appreciate rightly the exact moment at which she is free to act.
>
> "* * * in The Norman Monarch (sup.), where a very similar problem was presented, all the members of the House of Lords who delivered judgment, I think, came to the conclusion that the fact that the vessel was *apparently* going to cross ahead was not a justification for the stand-on vessel departing from the rule."

In *The Delaware* case the identical issue of the effect of appearances under similar circumstances was before the court, the opinion stating:

> "The main fault charged upon the Talisman (the hold-on vessel), however, is that of not stopping and reversing, when the failure of the Delaware (the give-way vessel) to take measures to avoid her *became apparent.*" (161 U. S. 467.)

The court held directly that the fact that the failure of the give-way vessel *"became apparent"* to the hold-on vessel is not sufficient to relieve the latter from her duty to keep her course and speed, but that *"some distinct indication"* is necessary.

In *The Haida,* 191 Fed. 623, 625, the captain *"observed* that there would be a collision". The court said:

"That is not enough."

G. THE CIRCUIT COURT OF APPEALS WAS IN ERROR IN HOLDING THAT THE FAILURE OF THE "NEWPORT" TO ANSWER THE SIGNALS OF THE "SVEA" WAS THE "DISTINCT INDICATION" REQUIRED BY THE DELAWARE RULE.

What is a distinct indication depends upon the circumstances. There must always be some definite act on the part of the give-way vessel, distinct enough to communicate to the hold-on vessel her intention to take a course contrary to her legal obligation. This intention is ordinarily expressed by some unmistakable signal; for the mere change of course or speed, without the corresponding signal, might be *"some* indiction" of her intention, but would not be a *"distinct*

indication." If, in the instant case, the "Newport" had given a signal to the "Svea" indicating that she intended to maintain her course and speed and to cross the bow of the "Svea", respondent might argue with some plausibility that this was some indication of her intention.

It has, however, been held in *The New York,* 86 Fed. 814 (C. C. A. 6) that, in the circumstances of the instant case, even whistles by the "Newport" indicating that she intended to fail in her duty to avoid the "Svea" would not have been such a "distinct indication" as would have thrown upon the "Svea" the burden of changing her primary duty to keep her course and speed. In that case the Conemaugh was the give-way vessel and the New York the hold-on vessel, and it was argued that a two-blast whistle of the Conemaugh was a distinct indication to the New York that the Conemaugh was about to fail in her duty to keep out of the way of the New York and that, by reason of this indication, it became the duty of the New York to stop and reverse. The court said, by Taft, C. J.:

> "This conclusion of fact is important in considering the next point made in the petition for rehearing,—that the Conemaugh's two blast whistles were distinct indications of her intention to do what she did. In situations where a vessel is pursuing a course which the law gives her the right to take without the assent of another vessel, the whistle consistent with that course is to be regarded as a positive indication of her intention to pursue it. But we apprehend that, where a vessel has no right to pursue a particular course without receiving the assent of the vessel she is meeting, the whistles she uses to

> obtain that assent are merely invitations to an agreement contrary to the usual mode of passing, and are not to be taken as a distinct indication that, on failure to obtain the assent she seeks, she will violate the rules of navigation, at least until there is something additional in her conduct to justify such an inference." (86 Fed. 816.)

If the signals of the give-way vessel, advising that she proposes to fail in her duty are not a distinct indication of her intention to fail in her primary duty, it follows a fortiori that mere silence is not a distinct indication such as the law requires before the hold-on vessel is permitted to change her course and speed.

In *The Cygnus,* 142 Fed. 85 (C. C. A. 2) the give-way vessel gave two blasts indicating that she proposed to cross the bow of the hold-on vessel. The latter dissented by giving one blast. This interchange of signals was repeated. The hold-on vessel, however, obeyed the rule and continued her course and speed. The district judge held her in fault because she did not stop and reverse. The decree was reversed on appeal, and the give-way vessel held solely at fault. The court said:

> "The Cygnus' (give-way vessel) two blasts given at that time were but an *invitation* to modify the rule which she was perfectly justified in proposing. It might well be assumed that, so long as the invitation, even if repeated later still at a safe distance, was not accepted, *the rule would be followed.*" (142 Fed. 88.)

If, therefore, the "Newport" had blown signals to indicate that she proposed to cross the bow of the "Svea", this would not have been a distinct indica-

tion that she was about to do so, if the "Svea" had dissented by giving signals that she would keep her course and speed. A fortiori the "Newport's" silence, after the "Svea's" notification that she was keeping her course and speed was not a "distinct indication" that the "Newport" was about to fail in her duty; the natural interpretation of this silence was that she was content to follow the law.

In *The Deveaux Powell,* 165 Fed. 634, (C. C. A. 2) a tug, the give-way vessel, ran into the port quarter of a ferry boat, the hold-on vessel, on crossing courses. The district judge imputed contributory fault to the hold-on vessel, because her pilot

> "twice claimed the right of way (by sounding one whistle) and understood that it was not accorded. He knew of the continued inattention or misapprehension of the pilot of the tug, as the vessels converged over a considerable distance on crossing courses, and yet kept on his way to the menaced condition." (120 Fed. 523.)

The decree of the District Court was, however, reversed on appeal as to the hold-on vessel, on the ground that all that the pilot of the hold-on vessel "knew was that the tug had twice failed to answer his signals and that the vessels were approaching on crossing courses; but * * * a trifling change of her helm to port would have set her in safety under the stern of the ferryboat." (165 Fed. 635.)

In the instant case a trifling change, in the last few seconds, of the "Newport's" helm to port would have deflected her bow sufficiently to enable the remaining eighty feet of the "Svea" to pass into safety.

In *The John H. Starin,* 162 Fed. 146 (C. C. A. 2), the give-way vessel blew three successive two-blast whistles, indicating a wish to navigate contrary to the rule. The hold-on vessel responded each time with a one-blast whistle, indicating that she refused to allow a modification of the rule. It was held by both courts that it was the duty of the hold-on vessel to maintain her course and speed.

If an improper signal, three times repeated, is not a distinct indication that the vessel "is about" to fail in her duty to keep out of the way: how could it be reasonably contended that the mere failure to give signals, or the failure to answer unnecessary, though proper, signals, was a distinct indication of an intention to disregard the rule?

In *The Delaware,* supra, the hold-on vessel gave two separate one-blast signals, and an alarm signal, none of which signals was answered by the give-way vessel. The court exonerated the hold-on vessel, thereby impliedly holding that the mere failure of the give-way vessel to answer signals of the hold-on vessel is not a distinct indication that the give-way vessel is about to fail in her duty to avoid the hold-on vessel.

In the instant case the one-blast signal given by the "Svea" was dictated by caution. It indicated that the "Svea" intended "to comply with her legal obligation to keep her course, and throw upon the other steamer the duty of avoiding her." (*The Delaware,* 161 U. S. 467.) The signal was not necessary and required no answer; hence the failure of the "Newport" to answer had no significance and could not be

considered as an indication that she was about to fail in her duty. When the ships were a little over a mile apart the "Svea" gave a danger signal; to this signal no answer was required by the international rules. Suppose the "Svea" had, immediately after the first danger signal, changed her course and speed, and a collision had occurred, she would have been held at fault by the Circuit Court of Appeals, which apparently thought that the proper time for the "Svea" to act had not come until later, when she repeated the danger signal. The duties of the "Newport" were in no wise modified by the alarm signals of the "Svea". These signals merely indicated to the "Newport" that the "Svea" was "in doubt" as to how the "Newport" intended to avoid her. (Compare Art. 23, Rule III, Inland Rules.) The "Svea's" second alarm signal indicated that she was still in doubt. In that moment the "Newport" still had ample opportunity to avoid the "Svea"; hence her failure to answer was consistent with an intention to avoid the "Svea" within the margin of time still remaining. It was not an indication—certainly not a distinct indication—that she intended to persist in her course and cross the bow of the "Svea". A distinct indication would have required at least some definite notification by signal, or some visible maneuver.

H. THE CIRCUIT COURT OF APPEALS WAS IN ERROR IN HOLDING THAT THE FAILURE OF THE "NEWPORT" TO MANEUVER, IMMEDIATELY AFTER THE LAST SIGNAL FROM THE "SVEA", WAS THE "DISTINCT INDICATION" REQUIRED BY THE DELAWARE RULE.

The Circuit Court of Appeals held that the failure of the "Newport" to maneuver immediately after the last signal from the "Svea" "made it distinctly apparent, we think", that she was about to fail in her duty. The finding of the trial court is, however, that it was not distinctly apparent to the master of the "Svea", but that he was "always uncertain". At all events it was not a "distinct indication" in the sense of the *Delaware* rule.

In the nature of things the intention of a crossing vessel burdened with the duty of keeping out of the way and pursuing a given course in silence is ambiguous as long as she has the opportunity to keep out of the way. She may at any moment change her course or speed in compliance with her statutory duty, or she may intend to fail in her duty. However, the master of the other vessel, watching her progress, is justified in assuming that she will obey the law while it is possible for her to do so. The master of the "Svea", observing the "Newport's" maneuvers, was, as the trial judge held, required to assume that this burdened steamship, of large size and carrying many passengers, proceeding at a speed between nine and ten knots per hour in the open sea, was properly manned and officered; he was further required to assume that she would, in obedience to the law of the sea, take the necessary steps to avoid the "Svea" while it was possible for her to do so, no

whistles or other positive indications to the contrary having been received. As to whether she would avoid the "Svea" by porting, or by stopping and reversing, or by both measures, remained a matter of doubt in his mind.

The Circuit Court of Appeals held that the fact that the "Newport" *failed to maneuver* immediately after the last signal from the "Svea" "made it distinctly apparent, we think, that she intended to persist in her course and thus made the danger of collision manifest. It therefore became the duty of the 'Svea' to yield adherence to the primary right to hold her course and speed, and to do what she could to avoid disaster."

But this exact proposition was considered by the Supreme Court in the *Delaware* case and rejected. The court, in discussing previous divergence between the authorities said:

> "Some even go so far as to hold it the duty of the preferred vessel to stop and reverse, when a *continuance upon her course* involves an *apparent* danger of collision. Upon the other hand, other authorities hold that the master of the preferred steamer ought not to be embarrassed by *doubts* as to his duty, and, unless the two vessels be in extremis, he is bound to hold his course and speed." (161 U. S. 468.)

The Supreme Court weighed these two divergent views (one of which is supported by cases arising under the old law, when action was required by both vessels) and decided in favor of the present rule, *rejecting the suggestion that the mere continuance of the give-way vessel upon her course, although involv-*

ing apparent danger of collision, changes the duty of the hold-on vessel and makes it her duty to yield adherence to what the court below calls "the primary right to hold her course and speed."

No one would now seriously attack the potency of the reasons for the settled rule, expressed by the court in the *Delaware* case in the following words:

> "If the master of the preferred steamer were at liberty to speculate upon the possibility, or even of the probability, of the approaching steamer failing to do her duty and keep out of his way; the certainty that the former will hold his course, upon which the latter has a right to rely, and which it is the very object of the rule to insure, would give place to doubts on the part of the master of the obligated steamer as to whether he would do so or not, and produce a timidity and feebleness of action on the part of both, which would bring about more collisions than it would prevent. Belden v. Chase, 150 U. S. 674; The Highgate, 62 L. T. R. 841; S. C. 6 Asp. Mar. Law Cases, 512." (161 U. S. 469.)

In the case of *The Woolsum,* 1926 Amer. Mar. Cases, 1098, on p. 1109 (C. C. A. 5), recently decided, the court said correctly:

> "The fact that the West Himrod * * * *continued to go forward* * * * was not enough to show that she would not stop before she crossed the bows of the Woolsum * * *."

I. ANY DISTINCT INDICATION THAT THE "NEWPORT" WAS ABOUT TO FAIL IN HER DUTY TO AVOID THE "SVEA", BEING ABSENT, THE "SVEA" WAS NOT IN FAULT UNDER THE DELAWARE RULE FOR MAINTAINING HER COURSE AND SPEED UNTIL THE VESSELS WERE IN EXTREMIS.

The evidence shows that it was possible for the "Newport" to avoid the "Svea" until the vessels had approached within the distance of a ship's length. The master of the "Newport" testified that she was "an easily handling ship, a handy ship to handle" (R. 124), and that "before you had gone a shiplength she would start to turn." The "Newport" struck the "Svea" about 80 feet forward of the stern; at her rate of speed these eighty feet would have been traversed by the "Svea" in a few seconds. A trifling porting of the "Newport's" wheel, or reversing, a few seconds before the collision would have set the "Svea" in safety and prevented the collision. To quote again from the *Delaware,* mutatis mutandis: "Until the last moment the 'Svea' had a right to assume that the 'Newport' would comply with the rule." (161 U. S. 469.)

When the vessels were at the distance of a shiplength, they were in extremis and no action by the "Svea" could have saved the situation. The District Court found:

> "The 'Svea' first realized that the 'Newport' was not going to do anything when the ships were but two hundred feet apart, and nothing could thereafter have been done by the 'Svea' which would have prevented or avoided the collision with the 'Newport'." (R. 65.)

J. BURDEN OF PROOF.

Under the settled law the "Newport", being admittedly at fault, assumed the burden of showing beyond any doubt that some fault of the "Svea" contributed to the collision. In *The City of New York,* 147 U. S. 72, 85, this court said:

> "Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is *not enough for such vessel to raise a doubt with regard to the management of the other vessel.* There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor."

In *The Victory & The Plymothian,* 168 U. S. 410, 423, this court said:

> "As between these vessels, the fault of the Victory being obvious and inexcusable, the evidence to establish fault on the part of the Plymothian must be *clear and convincing* in order to make a case of apportionment."

Under the rule of these cases it was incumbent upon the "Newport" to show how the "Svea" could have avoided the collision by some maneuver on her part. It was not sufficient to raise a mere doubt by asserting that she should have done "something", or that she was at fault because the collision occurred on a clear morning.

K. CASES CITED IN THE APPENDIX.

We are satisfied that *The Delaware* and the other authorities cited herein show conclusively that the

decision of the Circuit Court of Appeals should be reversed.

For the convenience of the court, however, we have cited in an Appendix some leading authorities of the English law, showing that the law of England is in harmony with the rule of the *Delaware* case; and have also epitomized and classified the relevant cases cited on both sides of the controversy in the lower courts, dividing them as follows:

First Class: Cases where the hold-on vessel was condemned for changing course and speed.

Second Class: Cases where the hold-on vessel was upheld for maintaining course and speed.

Third Class: Cases where the hold-on vessel was excused for changing course and speed.

Fourth Class: Cases where the hold-on vessel was condemned for maintaining course and speed.

It will be noted at a glance that the cases of the *first* and *second* class support the contentions of petitioners. In some of these cases the hold-on vessel was condemned for doing what respondents claim the "Svea" should have done. Nevertheless respondents have cited several of the cases of the first class, such as *The Coamo, The Southern, The West Hartland* and *Yang-Tse Ins. Co. v. Furness, Withy & Co.,* relying upon dicta extracted from these cases.

In the cases of the *third* class (Nos. 21-26) the hold-on vessel was excused for taking action on the ground that its action was taken in extremis, and on the further ground that the give-way vessel had

given distinct indication that she would not obey the rule.

In the cases of the *fourth* class (Nos. 27-31), action on the part of the hold-on vessel was required under the rule of the *Delaware* case: In *The Gladys* (No. 27) the give-way vessel was a tug with three barges in tow, the whole 4000 feet long. It was an *impossibility* for the give-way vessel to avoid the hold-on vessel. Hence, the hold-on vessel was held in fault for maintaining course and speed. In *The Senator Rice* (No. 28) the court held that a signal by the give-way vessel indicating: "I am going to cross your bow" is the "distinct indication" required by the rule. In *The Tenadores* (No. 29) the give-way vessel signaled: "Get out of my way, or I'll run you down". The court considered this to be a "distinct indication."

In some cases a visible *change* of course by the give-way vessel, evidenced by the shifting of lights, may be a distinct indication that the give-way vessel is not taking the proper steps to keep out of the way; but this is obviously different from the instant case where the give-way vessel *fails* to change within the time when it is possible for her to do so.

CONCLUSION.

It seems clear from the foregoing discussion that the case of *The Delaware* (supra) and the decision of the Circuit Court of Appeals in the instant case

cannot stand together. It would be difficult to find a more analogous condition of facts. In both cases the hold-on vessel blew whistle signals which were not answered by the give-way vessel and held her course and speed. In both cases the hold-on vessel is charged with the alleged fault "of not stopping and reversing when the failure of the 'Delaware' to take measures to avoid her *became apparent.*" (161 U. S. 467.) In the *Delaware* case the court decided that the fact that it "became apparent" to the hold-on vessel that the give-way vessel failed to take measures to avoid her is not sufficient to hold her at fault, but that "distinct indication" is required; the court also decided that the failure of the give-way vessel to answer the whistle signals blown by the hold-on vessel was not the "distinct indication" required which would justify the court in holding her in fault.

The conclusion is inevitable that the decision of the Circuit Court of Appeals is contrary to the settled law as declared by the Supreme Court. It is also contrary to the principle stated by the court in *Belden v. Chase,* 150 U. S. 674, 699:

> *"Obedience to the rules is not a fault even if a different course would have prevented the collision, and the necessity must be clear and the emergency sudden and alarming before the act of disobedience can be excused. Masters are bound to obey the rules and entitled to rely upon the assumption that they will be obeyed, and should not be encouraged to treat the exceptions as subjects of solicitude rather than the rules. The Oregon,* 18 How. 570."

The decision of the Circuit Court of Appeals, decreeing a division of damages in this case, should be reversed.

Dated, San Francisco,
November 9, 1927.

Respectfully submitted,
LOUIS T. HENGSTLER,
FREDERICK W. DORR,
Proctors for Petitioners.

(APPENDIX FOLLOWS.)

Appendix.

Appendix

(a) THE ENGLISH LAW.

The general rule extracted from many English authorities is stated in the following language:

> "The rule requiring a ship to keep her course and speed must be observed strictly. So long as there is a possibility of the other ship clearing her, she must stand on."
>
> (*Marsden, Collisions* 8th ed., 386.)

> "To be held to blame for not departing from a rule, the circumstances must be such that to a man of ordinary skill and intelligence it must have been *perfectly clear, almost a certainty,* that adhering to the rule would cause a collision."
>
> (*Marsden,* p. 11.)

In *The Gulf of Suez,* 15 Asp. 328 (Ct. of App. 1921), Lord Sterndale, M. R., says (p. 333):

> "* * * I think it is very important that no rule should be laid down by the court which would throw any burden or give any encouragement to the stand-on ship to alter her course or to act in any way before she is absolutely obliged to do so. The statement of the rule in Mr. Marsden's book seems to be quite correct. 'This rule is perhaps the most difficult of all the regulations for seamen to adhere to. It must always be a matter of difficulty for the officer in charge of the vessel which has to keep her course and speed to determine when the time has arrived to take action, for if he acts too soon, he may disconcert any action which the other vessel may be about to take to avoid his vessel, and be blamed for so doing, and yet the time may come when he must take action. The precise point when he should

> cease to keep his course and speed is difficult to determine, and some latitude is allowed him in determining this'—those last words are taken from the judgment of Lord Gorell in The Albano * * * —'*and when it is shown that he was carefully watching the other vessel and endeavoring to do his best to act at the right moment, he will not be held to blame, though it afterwards appears that he waited too long or acted too soon.*' Those words are taken from the judgments in The Huntsmen (104 L. T. Rep. 464; 11 Asp. Mar. Law Cas. 606) and The Ranza (79 L. J. P. 21n)."

In *The Orduna,* 14 Asp. 574 (Ct. of App. 1919), the hold-on vessel changed her course by starboarding when the vessels were about five hundred yards apart, and before they were in the agony of collision; she was held to blame for this action in the admiralty division. The Court of Appeal affirmed this decision.

The facts of the case are very similar to those in the instant case. The navigating officer of the hold-on steamer, the Orduna, testified:

> "'When the *Konakry* was about a quarter of a point on the starboard bow and distant about a quarter of a mile off, I ordered the helm to be starboarded ten degrees, and immediately afterwards, as the ships were closing rapidly, I ordered hard-a-starboard. * * * My reason for giving the order to starboard was that it was clear that the other ship was passing onto my starboard side, and I starboarded to give her a wider clearance.'"
>
> (14 Asp. 576.)

On these facts Bankes, L. J., said:

> "He acted * * *, because *he considered* that he was justified in assuming that the Konakry, which was breaking, and had broken, the regulations, *was continuing on her course, and would*

not alter so as to avoid risk of collision. She was not fully clear, and was still a crossing vessel; and partly by failing up to that time to get out of the way, and partly because, when she was so nearly across, she had *failed to give any indication by a signal* that she was about to take action under her port helm, he *assumed* that he was justified in considering * * * that she *would* continue her course without taking action, and that he therefore was entitled to starboard his helm in order to give the vessel a wider berth. * * * This second officer's case is that the Konakry had *allowed the time for acting to go by,* and that he was, under those circumstances, justified in taking the course he took. I think there may be such cases, but I agree entirely with what counsel for the respondent said as to the *importance of adhering to the strict observation of the regulations.* I think such a case ought to be scrutinized with the very greatest care. A somewhat similar case was suggested to exist in *The Norman Monarch* * * * and no member of the House of Lords accepted the proposition that the other vessel in that case, the *Phrygia,* was in such a position. The Lord Chancellor, it was quite true, suggested that, *if* the Norman Monarch had been exactly ahead of the Phrygia, she might possibly have been justified in starboarding her helm, having regard to the fact that the Norman Monarch had given no indication she was about to port; but he only suggested it was a possibility, and the view of Lord Phillimore suggests that *it would be dangerous to accept the position,* as he expresses it, that the officer of the Phrygia *thought* that the Norman Monarch *would* draw ahead in a few seconds." (14 Asp. 576.)

Scrutton, L. J., said:

"I entirely agree, and wish to emphasize, if it is necessary, the importance of these rules being strictly observed. The position of ships crossing with a risk of collision is difficult. It has been

thought right to tell one of the ships to keep her course and speed, and the other ship to keep out of the way. The give-way ship can act with much greater certainty if she knows that the stand-on ship is going to do exactly what she is doing when seen, if the stand-on ship acts too soon, she may easily put the give-way ship in a great difficulty; and, *hard as it is, she ought to keep her course and speed until the last possible moment.* * * * * * * if the courses are crossing, but the ships have not yet crossed, and *if although the give-way ship has not yet acted, she can act and pass under the stern by her own action alone, the stand-on ship is in a position in which she ought to stand on.*"

(14 Asp. 577.)

In *The Byfoged Christenson,* 4 App. Cas. 699, 4 Asp. 201 (Priv. Co. 1879), there is an instructive discussion as to the scope of discretion which should be left to masters of vessels, regarding obeying and departing from the sailing rules. While the case is one of collision between sailing vessels on crossing courses, the principles apply to the instant case. The Privy Council said:

"The question raised by the cross appeal arises upon the finding of the learned judge that both vessels were to blame, on the ground that, although the duty of keeping out of the way lay upon the Christensen, those on board the William Frederick, when they found that the other vessel was not going to perform its duty, ought not to have pertinaciously adhered to the 18th rule of the road by keeping on their course, but should have adopted some manoeuvre in order to avoid the collision which afterwards took place. The learned judge in so deciding relied on the case of The Commerce (3 W. Rob. 287) before Dr.

Lushington. Their Lordships desire to remark that, though the principle involved in that case may be in itself a sound one, it is one which should be applied very cautiously, and only where the circumstances are clearly exceptional. *They conceive that to leave to masters of vessels a discretion as to obeying or departing from the sailing rules is dangerous to the public; and that to require them to exercise such discretion, except in a very clear case of necessity, is hard upon the masters themselves, inasmuch as the slightest departure from these rules is almost invariably relied upon as constituting a case of at least contributory negligence.* In the present case their Lordships think that the principle of the decision in the case of The Commerce is not applicable. There is no *constat* at what particular time the master of the William Frederick ought to have come to so distinct a conclusion that the other vessel was not about to obey the rule as to justify his departure from what was his prima facie duty."

(4 Asp. 202.)

(b) CASES CITED IN LOWER COURTS EPITOMIZED AND CLASSIFIED.

First Class: Hold-on Vessel Condemned for Changing Course and Speed.

1. *The Britannia,* 153 U. S. 130. Hold-on steamer ported, stopped and reversed.

2. *The Northfield,* 154 U. S. 629. Hold-on tug ported and stopped.

3. *The Coamo,* 280 Fed. 282 (C. C. A. 2.) Hold-on steamer starboarded. "Would by holding her course and speed have passed in perfect safety across the Essex' bow." (284)

4. *The John H. Starin,* 162 Fed. 146 (C. C. A. 2). Hold-on steamer changed course. Give-way vessel indicated by whistles that she wished to cross ahead of the other.

5. *The Norfolk,* 297 Fed. 251. Hold-on steamer changed speed.

6. *The Southern,* 224 Fed. 210, aff. 235 Fed. 78 (C. C. A. 4). Hold-on launch changed course to starboard.

7. *The Straits of Dover,* 120 Fed. 900 (C. C. A. 4). Hold-on steamer ported, stopped and reversed.

8. *The Umbria,* 153 Fed. 851 (C. C. A. 2). Hold-on steamer starboarded.

9. *The West Hartland,* 2 Fed. (2d) 834 (C. C. A. 9). Hold-on steamer reversed her engines.

10. *The Wm. E. Gladwish,* 206 Fed. 901 (C. C. A. 2). Hold-on tug ported.

11. *Yang-Tse Ins. Ass'n. v. Furness, Withy & Co.,* 215 Fed. 859 (C. C. A. 2). Hold-on steamer ported.

Second Class: Hold-on Vessel Upheld for Maintaining Course and Speed.

12. *The Delaware,* 161 U. S. 459, 469: "It was her (give-way steamer) plain duty to apprise the tug (hold-on vessel) * * * either by blowing the starboard *signal* of two whistles, or an alarm whistle, to *indicate* that the circumstances were such as to render it impossible for her to fulfill her obligation to keep out of the way of the tug. If she had done so a different question would have been presented. *Until the last moment* the tug had a right to assume that she would

comply with the rule. Had the tug stopped and reversed, she might * * * have brought about a collision with the Delaware. * * * In any event there is too much doubt about the fault of the Talisman to justify us in apportioning the damages."

13. *The Nacoochee,* 137 U. S. 330, 340. "Even if it was error of judgment in the schooner to hold her course, it was not a fault, being an act resolved upon in extremis, a *compliance with the statute,* and a manoeuvre produced by the fault of the steamer."

14. *The Binghampton,* 271 Fed. 69 (C. C. A. 2). The District Court held the hold-on vessel liable, because "She stubbornly held her course into collision." (p. 70.) The Circuit Court of Appeals discharged the hold-on vessel from all liability under the rule of *The Delaware,* (supra). The hold-on vessel had *no indication* that the give-way vessel was not going to abide by the rule *other than non-change of course.*

15. *The Chicago,* 125 Fed. 712, 718 (C. C. A. 2). "There is evidence that, under reversed engines and a hard astarboard wheel, such a boat (the give-way steamer) could change direction * * * without forereaching more than a length and a half. We are of the opinion that it was not fault on the part of the Augusta to hold her course and speed so long as that possibility existed, in the absence of some *definite intimation by signal or action* that the Chicago was going to fail in her duty."

16. *The Cygnus,* 142 Fed. 85, 88 (C. C. A. 2). The district judge held the hold-on vessel in fault solely because she did not stop and reverse. The Circuit

Court of Appeals reversed this decision, finding the give-way vessel solely in fault, saying:

> "The Dimock was in the situation in which so many other privileged vessels have been put by gross disregard of the obligation laid upon a burdened vessel; where one cannot tell at what moment of time the other vessel will conform to the rules, and where an effort to save catastrophe by altering course or changing speed may coincide precisely in time with some change by the other boat, and thus precipitate the disaster, instead of avoiding it. We have recently considered this subject in The City of Augusta and The Chicago * * *, where the situation was in some respects similar to the one at bar, and called attention to the forcible exposition of the duty of the privileged vessel which is found in * * * The Delaware * * * where the Talisman was held free from fault, although she twice sounded signal blasts and then an alarm, none of which were answered, but did not change her helm or reduce her speed before collision."

17. *The Devaux Powell,* 165 Fed. 634, 635 (C. C. A. 2). The give-way vessel failed to answer the signals of the hold-on vessel twice; the district judge held it liable, because it

> "knew of the continued inattention or misapprehension of the pilot of the tug, as the vessels converged over a considerable distance on crossing courses, and yet kept on his way to the menaced collision."

Reversed by the Circuit Court of Appeals.

18. *The Haida,* 191 Fed. 623; aff. 196 Fed. 1005 (C. C. A. 2). The hold-on vessel could not, until it was too late to avoid the collision, with certainty know

that the other vessel would not change her course, as she might have done and as it was her duty to do. *Held:* Hold-on vessel not chargeable with fault because she kept her course and speed.

19. *L. Boyers Sons Co. v. U. S.*, 195 Fed. 490, 491 (C. C. A. 2). Hold-on vessel entitled to assume that other vessel will conform to rules of navigation and was not at fault although she "did not starboard when she *saw* that the Cactus (give-way vessel) intended to keep on". The fact that the burdened vessel at first proposed to exchange rights of way, which proposal was rejected, is not a "distinct indication".

20. *The Musconectung,* 255 Fed. 675, 676 (C. C. A. 2). The District Court held the hold-on vessel at fault for failing to reverse or slacken speed immediately after blowing an alarm signal. The Circuit Court of Appeals reversed this decree, holding the vessel not at fault. The give-way vessel proposed to the hold-on vessel by signal that the latter give way; the latter by signal declined. Held: The hold-on vessel had a right to assume that thereupon the give-way vessel would navigate in conformity with the rule. "She was justified in letting some time elapse, in order to ascertain whether the Hercules would continue on or would port her helm, and during this lapse of time she conformed to the law in keeping her speed and course, even though the subsequent events proved that stopping and backing would have been better * * * the privileged vessel should not be too quick in assuming that the burdened vessel is not going to yield to it, although its behavior may be erratic."

N. B. This case shows that indication by give-way vessel that she proposes not to give way, followed by indication by hold-on vessel that she does not consent to the proposal, is equivalent to an absence of distinct indication.

Third Class: Hold-on Vessel Excused for Changing Course and Speed.

21. *The Charles A. Campbell,* 142 Fed. 996 (D. C. Mass.). The red light of the give-way vessel continued to approach and to bear more nearly ahead and finally appeared almost directly ahead ("close under her bow"). This was properly held a distinct indication that the give-way vessel was heading across the bow of the hold-on vessel when the latter changed her course, *in extremis.* The court held that the hold-on vessel was not in fault.

22. *The Montauk,* 180 Fed. 697, 699 (C. C. A. 2). Held: Failure of the hold-on vessel to hold course and speed "was not a fault, but an error *in extremis,* when the collision owing to the gross fault of the Montauk was imminent." The give-way vessel *three times blew signals of two whistles,* indicating her intention not to keep out of the way.

23. *The Queen Elizabeth,* 122 Fed. 406, 409 (C. C. A 2). The hold-on vessel ported *in extremis.* Held: Not a fault, even though unwise.

> "Knowing that his was the privileged vessel he held his course in the expectation that the Birdsall would make some effort to keep out of the way. He ported only *at the last moment* when it was apparent that the Birdsall was doing nothing and *when a collision seemed certain* * * *

the time was too short for accurate calculations or cool and deliberate action."

24. *The Shawmut,* 261 Fed. 616, 621-3 (D. C. Pennsylvania). Collision between steamer (give-way) and sailing schooner (hold-on). The schooner held steady on her course, but put her helm to starboard when "the steamer was so close that a collision was inevitable in order to ease the shock". In this "it may be that the schooner used bad judgment"; but "the judgment exercised was under the evidence a hasty judgment, forced upon the schooner by the steamer". *Held:* "The schooner was without blame for the collision, * * * the *error of judgment* in putting her helm to port, instead of holding her course, being the result of a sudden impulse itself resulting from the negligence of the steamer."

25. *The Transfer No. 15,* 145 Fed. 503, 504 (C. C. A. 2). A tug and steamship met on crossing courses; the hold-on steamship stopped and reversed. Held: The tug "was clearly in fault for proceeding to cross the bows of the steamer without first having, while at a safe distance, obtained the latter's assent to such navigation. The persistent advance of the tug beyond the safety limit, *sounding signals which indicated an intention to continue such advance,* was a sufficient indication to the privileged vessel to warrant her in stopping and reversing".

26. *The Zampa,* 113 Fed. 541 (N. D. Cal.). Two sailing vessels. There was no imperative duty on one to keep her course, but only a qualified duty. The green light of one schooner had almost moved across

the path of the other, when the other *"changed her course at the last moment"*. (Page 543.) The collision was then unavoidable by the burdened vessel alone. Action was *in extremis.*

Fourth Class: Hold-on Vessel at Fault for Keeping Course and Speed.

27. *The Gladys,* 144 Fed. 653, 657 (C. C. A. 2). The give-way vessel was a tug with three barges in tow, the whole 4000 feet long. The hold-on vessel was a schooner. The tug crossed the course of the schooner, and *the first barge had passed 500 feet* before the schooner made a change. The schooner collided with the second barge. *Held:* The schooner saw the tug and tow for an hour and a half before the collision and had notice of the intention of the tug to hold her course, and did not act when disaster "could be avoided *only* by the prompt intelligent action of the schooner. * * * That the tug with her tow, four-fifths of a mile in length, could cross ahead of her was, of course, an impossibility. * * * If, the moment she saw the tug, she had gone off to starboard, she would certainly have escaped. * * * She had plenty of time to prevent a collision after it was evident that *she alone could prevent it"*. (In this case the last moment when the give-way vessel could have prevented the collision was past. In the instant case the last moment when the "Newport" could save the situation was *later* than the moment when the "Svea" blew her second alarm signal.)

28. *The Senator Rice,* 223 Fed. 524 (C. C. A. 2.) The give-way vessel, a tug with a scow in tow, *blew*

two blasts, indicating that she would continue on her course and cross the bows of the hold-on vessel. The latter answered with one blast, indicating that she dissented. The hold-on vessel collided with the scow in tow of the give-way vessel, after the latter had crossed her bow. *Held:* Both at fault, the hold-on vessel on the ground that she should have stopped *after receiving the two blasts.* The distinction between this and the instant case is, that the signal given to the hold-on vessel was a *distinct indication.*

29. *The Tenadores,* 298 Fed. 740 (C. C. A. 2). The two ships were close together when they first saw each other. The give-way steamer *gave distinct indication* that she did not intend to keep out of the way *by blowing two blasts,* the notice meaning: "Get out of my way, or I'll run you down." (742.) In that instant "nothing but instant acquiescence on Murillo's (hold-on vessel) part could avoid collision * * * with her slow speed and full power, she could have avoided collision by yielding right of way to the other vessel" (742); but Murillo gave a cross signal and continued her course and speed. *Held:* Murillo was also at fault.

30. *The New York,* 175 U. S. 187. The hold-on steamer ("New York") *"was advised by signals* * * * that the Connemaugh was about to navigate so as to involve risk of collision, should the New York keep her course and speed". (125 Fed. 717.) She was also advised by seeing the white light of the other steamer. She was held at fault for these and other reasons, the principal one being that "her officers failed conspicuously to see what they ought to have

seen or to hear what they ought to have heard". (Defective lookout.) This case is not governed by Article 21, but by the old rule.

31. *The Albert Dumois,* 177 U. S. 240, was a case of "vessels meeting end on, or nearly so; and a *change of course* of the Dumois, evidenced by the *shifting of lights,* was observable to the Argo, and *notice to her* that the former was not going to starboard, but, on the contrary, was swinging to port across her bows". (125 Fed. 718.)

The following cases cited by respondents are not relevant:

The Admiral Watson, 266 Fed. 122 (D. C. Wash.), is not a case of vessels meeting on crossing courses, but a "narrow channel" case where the course of the approaching vessel was "uncertain or in doubt", and a local pilot rule prescribed that the "vessel in doubt" shall give a danger signal. She gave no danger signal and was held in fault on that ground.

The Devonian, 110 Fed. 588 (D. C. Mass.), is a case where the hold-on vessel was condemned for *failure to keep a lookout.* The remarks of the court relative to her duty to keep her course are obiter. Furthermore, they are addressed to a peculiar situation, in a crowded harbor, where the holding of her course, by a sailing vessel, is almost a prima facie fault.

The George S. Tice, 287 Fed. 127 (C. C. A. 2), is not a case of crossing vessels, but a narrow channel case with special features. Indeed, the Circuit Court of Appeals for the Second Circuit has applied the *Delaware* rule correctly in so many cases that it would

be surprising to find one case in which it could have gone astray.

The Jason, 288 Fed. 57 (D. C. N. Y.), is not a case of crossing vessels, nor dealing with the duty of any vessel to keep her course and speed.

Nautik v. Oostvorne, 6 Lloyd's List 110, is not a case of crossing, but of overtaking vessels. It involves no duty of either vessel to avoid the other, or to keep course and speed.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1926

No. 7[redacted]B 173

PACIFIC MAIL STEAMSHIP COMPANY, a corporation, (Respondent, Claimant and Cross-Libelant),

STEAMSHIP "NEWPORT", her engines, boilers, tackle, etc., J. McKINNON, Master of said vessel,

Cross-Petitioners and Respondents,

vs.

HENRY WILSON, F. A. WILSON, W. T. WILSON, LUCY W. KENDALL, A. KENDALL, MARY TROWBRIDGE, Administratrix of the Estate of A. J. PATTERSON, deceased, JAS. PENNYCOCK, O. BERTELSEN, J. S. HUTCHINSON, E. C. HUTCHINSON, HELENA ALLEN, A. B. JOHNSON, KATIE M. JOHNSON, MARIETT JOHNSON, A. HANSEN, CLARA A. BUCHHOLZ, H. W. JACKSON, L. EVERDING, FRANK GRAHAM, MARGARET A. WILSON, Trustee, CARRIE E. WILSON, J. H. WILSON, MARGARET A. WILSON, WM. C. WILSON, JAMES GRAHAM, B. P. NELSON (Libelants and Cross-Respondents), KARL ROHBERG, CHARLES S. SEMSEN, JAMES HAYES, C. H. ANDERSON, HARRY WALTON, W. SARRIS, GUST ANDERSON, GUST SAARINEN, WM. R. REILLY, LOUIS NORLOFF, JOHN McDONALD, WILSON BANGAY, ROBERT WHITE, GEORGE DOLAN, JOHN LEWIS, SETT STRAND (Libelants),

Cross-Respondents and Petitioners.

Cross Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit
and
Brief in Support Thereof.

EDWARD J. McCUTCHEN,
WARREN OLNEY, JR.,
FARNHAM P. GRIFFITHS,
Counsel for Cross-Petitioners.

Parker Printing Company, 532 Clay Street, San Francisco

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THE CROSS PETITION

The case is already before this court. Writ of certiorari was granted respondents January 10, 1927 to review the issue of mutual fault. This cross petition asks review also of the question whether the master of the Newport was properly held liable for the negligence of a subordinate officer 2

Summary and short statement of the matter involved 4

The District Court decreed the master of the Newport individually liable for the collision and the Circuit Court of Appeals affirmed (reluctantly as we read the opinion) because it felt bound under certain authorities adhering to the ancient doctrine of the maritime law, to decide that the master was properly held for the negligence of his subordinates 4

Why the cross petition should be granted—reasons listed 6

BRIEF IN SUPPORT OF THE CROSS PETITION.

Statement of the case as outlined above in the petition 10

Specification of Error: The Circuit Court of Appeals erred in deciding that the master of the Newport was properly held liable for the negligence of her third officer 10

Argument 10

I. The judgment conflicts with the established principles of the law of *respondeat superior*.

An intermediate servant or middleman is not liable for the negligent acts of a servant under him.

The parties who *are* liable for such negligence are: first, the inferior servant because of his personal negligence; second, the owner or principal because the work in course of which the negligence was committed was being done for his benefit 11

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II. Although there are certain State and District Court decisions and texts to the effect that a shipmaster *is* liable (irrespective of personal negligence) for the negligence of servants under him, there is also contrary authority. We do not think it is settled law, even in the lower courts, that the tort liability of a shipmaster is different from that of any other intermediate servant. *This court has not passed on the question* 13

III. Granting that the rule was once that a shipmaster is liable for the negligent acts of his subordinates, the reason for such harsh doctrine has ceased to exist and the rule should no longer be applied. *Cessante ratione legis, cessat ipsa lex* 21

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1926

No. 744

PACIFIC MAIL STEAMSHIP COMPANY, a corporation, (Respondent, Claimant and Cross-Libelant),

STEAMSHIP "NEWPORT", her engines, boilers, tackle, etc., J. McKINNON, Master of said vessel,

Cross-Petitioners and Respondents,

vs.

HENRY WILSON, F. A. WILSON, W. T. WILSON, LUCY W. KENDALL, A. KENDALL, MARY TROWBRIDGE, Administratrix of the Estate of A. J. PATTERSON, deceased, JAS. PENNYCOCK, O. BERTELSEN, J. S. HUTCHINSON, E. C. HUTCHINSON, HELENA ALLEN, A. B. JOHNSON, KATIE M. JOHNSON, MARIETT JOHNSON, A. HANSEN, CLARA A. BUCHHOLZ, H. W. JACKSON, L. EVERDING, FRANK GRAHAM, MARGARET A. WILSON, Trustee, CARRIE E. WILSON, J. H. WILSON, MARGARET A. WILSON, WM. C. WILSON, JAMES GRAHAM, B. P. NELSON (Libelants and Cross-Respondents), KARL ROHBERG, CHARLES S. SEMSEN, JAMES HAYES, C. H. ANDERSON, HARRY WALTON, W. SARRIS, GUST ANDERSON, GUST SAARINEN, WM. R. REILLY, LOUIS NORLOFF, JOHN MCDONALD, WILSON BANGAY, ROBERT WHITE, GEORGE DOLAN, JOHN LEWIS, SETT STRAND (Libelants),

Cross-Respondents and Petitioners.

Cross Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable William Howard Taft, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Your cross-petitioners, George (J.) McKinnon, master of the steamship Newport and Pacific Mail Steamship Company, owner of said steamship, respectfully represent to this Honorable Court as follows:

This cause is already before this court. Application of respondents, Henry Wilson, et al., for writ of certiorari was granted January 10, 1927. That application sought a review of that part of the decision of the Circuit Court of Appeals which held that the collision of the steamships Newport and Svea was due to the mutual fault of these vessels. The decision of the Circuit Court of Appeals also adjudged that your cross-petitioner, Captain McKinnon of the Newport, was properly held liable for the negligence of a subordinate officer. Inasmuch as the case is now to be reviewed on the merits in respect to the mutual fault issue, *your cross-petitioners respectfully ask that the issue of the individual liability of the master for the negligence of a subordinate be reviewed also.*

As admiralty cases in this court are trials *de novo*

Yeaton and others v. United States, 5 Cranch. 281;
Watts, Watts & Co., Ltd., v. Unione Austriaca di Navigazione, 248 U. S. 9;
Standard Oil Co. of New Jersey v. Southern Pacific Co. et al., 268 U. S. 146,

the entire cause is probably now before this court through the granting of the original petition for certiorari; but to

avoid any question in this regard cross-petitioners are, in view of the opinions of this court in

Federal Trade Commission v. Pacific States Paper Trade Assn., et al., #71 October Term, 1926; Decided January 3, 1927, and

Hubbard v. Tod, 171 U. S. 474, 494,

taking the liberty of filing this cross petition for certiorari.

As the original petitioners have already represented, and cross-petitioners now represent, this case of *Henry Wilson et al., v. Pacific Mail Steamship Company et al.*, No. 4902, recently decided by the United States Circuit Court of Appeals for the Ninth Circuit, affirming in part and reversing in part the judgment of the Southern Division of the United States District Court for the Southern District of California is an admiralty case in which the judgment of said Circuit Court of Appeals is made final by the provisions of the Judicial Code. This court has already required by its writ of certiorari issued in response to the original application that the cause be certified to it for review and determination, and your cross-petitioners now respectfully ask that the entire case be reviewed and determined including specifically the issue of the liability of the master of a vessel for negligence in her operation, even though he be not personally negligent.

It is submitted that this last named point involves an important question of federal law which has not been, but should be, settled by this court. The decision of the Circuit Court of Appeals in this regard is that the master of a vessel, although not personally negligent, is liable in

tort for the negligent act of subordinate officers and members of the crew to the same extent as the owners of the vessel.

It is submitted that this judgment against the master establishes a rule of liability without fault, which is in contravention of the settled principles of the general doctrine of *respondeat superior;* that, if in ancient times there was a real basis for such imposition of liability on the master of a vessel regardless of personal negligence, the basis has long since vanished; that the judgment under modern conditions of ship operation is harsh, unreasonable and unjust, particularly as such liability if imposed upon the master is greater even than that of the ship owner inasmuch as the latter has the benefit of the Harter Act* and the limited liability statutes** and the ship master has not.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

This cross petition involves the question whether the master of a vessel who is not personally negligent, may be held personally liable in tort for the negligent acts of his subordinates.

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*Act of Feb. 13, 1893, Ch. 105, Sec. 3, 27 Stat. at L. 445, U. S. Comp. Stat. Ann. 1916, Sec. 8031.

**R. S. 4283-4289, 9 Stat. at L. 635, R. S. 4289, 24 Stat. at L. 80, Act of June 26, 1884, C. 121, par. 18, 23 Stat. at L. 57 (U. S. Comp. Stat. Ann. 1916, Secs. 8021-8028).

This litigation arose out of a collision between the steamship Newport and the schooner Svea off the coast of California, November 29, 1922. The Svea interests libeled and the Newport interests cross-libeled. The former joined your cross-petitioner, the master of the Newport, as party respondent. The Newport pleadings, although admitting fault, specifically denied the master's personal participation therein (30)* and also charged the Svea with being in fault for the collision mutually with the Newport.

The District Judge held the Newport solely at fault and entered a decree against the Newport, her owner, Pacific Mail Steamship Company and also against your cross-petitioner, the master of the Newport (55). In the opinion of the District Judge (63) the question of the master's liability was not discussed, nor was there any finding that he was personally negligent.

The evidence is that he was not. The morning of the collision was bright and sunny; the sea calm and the wind negligible. No other vessels were in sight. Captain McKinnon had left the third officer in charge of the bridge and had gone below to his cabin (121) some twenty minutes before the collision (105). He was below in the lavatory when he first heard the whistle of the Svea (122). He got up and looked out the port and saw the Svea heading for the Newport (121), about 600 feet away (105, 122). He rushed to the bridge (122), but was too late to do anything to avert the collision.

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*Numbers in parentheses without other designation refer to pages of the Record.

Appeal (221) was taken from the decree of the District Court (55) adjudging the master of the Newport individually liable and error was duly assigned (217, Assignment xiii). Accepting it that the evidence excused the master from personal negligence the Circuit Court of Appeals felt impelled on the authority of certain State and District Court cases and text writers, to affirm the judgment (15 Fed. 2nd 342); though regretting it seems to us this necessity.

Referring to the argument that, if there ever had been reason for imposing such personal liability on a shipmaster, it had long ceased to exist, the Circuit Court of Appeals said:

> "There is force in the reasoning, but it does not seem to have been sufficiently cogent to persuade text writers and courts to break the more ancient and stricter doctrine of the maritime law."

CONCLUSION.

The cross petition should be granted for the following reasons:

1—The rule that a shipmaster, although free from fault, is liable in tort for the negligent acts of his subordinates is harsh, unreasonable and unjust.

2—The judgment conflicts with the established principles of the law of *respondeat superior*.

3—While there are admittedly certain State and District Court and text authorities holding that a shipmaster, free

from fault, is liable in tort for the acts of his subordinates there is also authority *contra* and the doctrine is not settled law.

4—Even assuming that there once were valid reasons for imposing such liability on a shipmaster, these reasons have long since vanished and do not exist under modern conditions of ship operation.

"Cessante ratione legis cessat ipsa lex."

5—The determination of the liability of a shipmaster under these conditions is a federal question of great importance to ship owners, operators and masters. *The question has never been passed upon by this court.*

WHEREFORE, your cross-petitioners respectfully pray that this cross petition for writ of certiorari be granted and that on hearing of the certiorari granted Henry Wilson et al., hereinabove referred to, this Honorable Court be pleased to review the question herein presented, whether cross-petitioner McKinnon was properly held liable for the negligence of the third officer of his vessel.

Dated: San Francisco, California,
January 22, 1927.

EDWARD J. MCCUTCHEN,
WARREN OLNEY, JR.,
FARNHAM P. GRIFFITHS,
Counsel for Cross-Petitioners.

State of California,
City and County of San Francisco. } ss.

FARNHAM P. GRIFFITHS, of lawful age, being first duly sworn, deposes and says:

That he is one of the attorneys for cross-petitioners in the above entitled cause; that he prepared the foregoing cross petition and that the allegations thereof are true as he verily believes.

FARNHAM P. GRIFFITHS.

Subscribed and sworn to before me this 22nd day of January, 1927.

(Seal) FRANK L. OWEN,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires November 22, 1929.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1926

No. 744

PACIFIC MAIL STEAMSHIP COMPANY, a corporation, (Respondent, Claimant and Cross-Libelant),

STEAMSHIP "NEWPORT", her engines, boilers, tackle, etc., J. McKINNON, Master of said vessel,

Cross-Petitioners and Respondents,

vs.

HENRY WILSON, F. A. WILSON, W. T. WILSON, LUCY W. KENDALL, A. KENDALL, MARY TROWBRIDGE, Administratrix of the Estate of A. J. PATTERSON, deceased, JAS. PENNYCOCK, O. BERTELSEN, J. S. HUTCHINSON, E. C. HUTCHINSON, HELENA ALLEN, A. B. JOHNSON, KATIE M. JOHNSON, MARIETT JOHNSON, A. HANSEN, CLARA A. BUCHHOLZ, H. W. JACKSON, L. EVERDING, FRANK GRAHAM, MARGARET A. WILSON, Trustee, CARRIE E. WILSON, J. H. WILSON, MARGARET A. WILSON, WM. C. WILSON, JAMES GRAHAM, B. P. NELSON (Libelants and Cross-Respondents), KARL ROHBERG, CHARLES S. SEMSEN, JAMES HAYES, C. H. ANDERSON, HARRY WALTON, W. SARRIS, GUST ANDERSON, GUST SAARINEN, WM. R. REILLY, LOUIS NORLOFF, JOHN MCDONALD, WILSON BANGAY, ROBERT WHITE, GEORGE DOLAN, JOHN LEWIS, SETT STRAND (Libelants),

Cross-Respondents and Petitioners.

Brief in Support of Cross Petition.

STATEMENT OF THE CASE.

This brief is submitted in support of the cross petition for writ of certiorari for a review of that part of the decision of the Circuit Court of Appeals (15 Fed. 2nd 342; Record 239) affirming the judgment and decree of the District Court holding Captain McKinnon, Master of the steamship Newport, individually liable for the collision in question. The decree of the District Court will be found at page 55 of the Record. The opinion of the District Court does not deal with the above point. This opinion will be found at page 63 of the Record and is reported in 2 Fed. (2nd) 255.

We refer, for further statement of the case, to the "summary and short statement of the matter involved" in the preceding cross petition.

SPECIFICATION OF ERROR.

The Circuit Court of Appeals erred in deciding that Captain McKinnon was properly held liable for the negligence of the third officer of the Newport.

ARGUMENT.

I. The judgment conflicts with the established principles of the law of *respondeat superior.*

An intermediate servant or middleman is not liable for the negligent acts of a servant under him.

The parties who *are* liable for such negligence are: first, the inferior servant because of his personal negligence; second, the owner or principal because the work in course of which the negligence was committed was being done for his benefit.

II. Although there are certain State and District Court decisions and texts to the effect that a shipmaster *is* liable (irrespective of personal negligence) for the negligence of servants under him, there is also contrary authority.

We do not think it is settled law, even in the lower courts, that the tort liability of a shipmaster is different from that of any other intermediate servant. *This court has not passed on the question.*

III. Granting that the rule was once that a shipmaster is liable for the negligent acts of his subordinates, the reason for such harsh doctrine has ceased to exist and the rule should no longer be applied. *Cessante ratione legis, cessat ipsa lex.*

I.

THE JUDGMENT CONFLICTS WITH THE ESTABLISHED PRINCIPLES OF THE LAW OF RESPONDEAT SUPERIOR.

An intermediate servant is not liable for the torts of subordinates in the absence of personal negligence.

We deem it to be settled law that an intermediate servant (or as he is sometimes denominated, intermediate

superior employee or middle man or superior or intermediate agent or superior servant) is not liable for the negligent acts of a servant under him. The two parties who *are* liable for such negligence are:

First: The inferior servant because of his personal negligence;

Second: The owner or principal under the doctrine of *respondeat superior* because the work in course of which the negligence was committed was being done for his benefit.

The intermediate servant in the absence of personal negligence, is not held.

This rule is so well settled that we merely refer in passing to the leading case:

Stone & Cartwright, 6 Term. Rep. (Durn & East 411); 101 Eng. Reprint Reports 622,

where Lord Kenyon said:

> "In all these cases I have ever understood that the action must either be brought against the hand committing the injury, or against the owner for whom the act was done: but it was never heard of that a servant who hires laborers for his master was answerable for all their acts."

and to

Brown & Sons Lumber Company v. Sessler, 128 Tenn. 665, 163 S. W. 812;

American Annotated Cases, 1915 C, 103 and cases cited;

Mechem - Agency, 2nd Ed. Sec. 1643.

Under the general and well established rule, therefore, judgment (in absence of personal negligence) would not lie against the master of the Newport. To sustain the judgment against him in this case it must be found that the case of a shipmaster is an exception to this general rule. Is it?

II.

ALTHOUGH THERE ARE CERTAIN STATE AND DISTRICT COURT DECISIONS AND TEXTS TO THE EFFECT THAT A SHIPMASTER IS LIABLE FOR THE NEGLIGENCE OF SUBORDINATE SERVANTS, WE DO NOT THINK IT IS SETTLED LAW THAT HIS LIABILITY IS DIFFERENT FROM THAT OF ANY OTHER INTERMEDIATE SERVANT. THERE IS AUTHORITY THAT IT IS NOT. THIS COURT HAS NOT PASSED ON THE QUESTION.

The question of the liability in tort of a master of a vessel free from personal fault has been rarely passed on; never, so far as we are able to ascertain, in recent years (until this case). But there is authority which holds that the case of a shipmaster is an exception to the general rule of non-liability of an intermediate servant for torts of subordinates. We have found but six cases which have definitely held the master liable.* Three of these are de-

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**Wilson v. Belvidere*, 30 Fed. Cas. 106, No. 17,790 (D. C. Pa. 1806) cited by the Circuit Court of Appeals, if good law, does not seem to us to be in point. It apparently holds that the entire personnel of the vessel must contribute, by deduction from and in proportion to, their monthly wages to make up for cargo lost by the negligence of any of them—except that those who remonstrate in advance against the negligence will not be thus required to contribute. There is no suggestion in the case of the right of any third party damaged by such negligence to sue non-negligent members of the ship's complement, nor is there any suggestion that each member of the ship's personnel may have a judgment rendered against him for the

cisions of New York State Courts; one is a Federal District Court case; and two are Louisiana cases which seem to us to be overruled. The six cases are

Denison v. Seymour, 9 Wend. 9, 11 N. Y. (C. L.) 515 (1832);

Foot v. Wiswall, 14 Johns, 304 (1817);

Kennedy v. Ryall, 67 N. Y. 379 (1876);

The City of New York, 25 Fed. 149 (1885);

Buel v. New York Steamer, 17 La. Rep. 541 (1841);

Daret v. Gray, 12 La. Ann. 394 (1857).

There are also several text writers who lay down the same exception to the general rule, notably *Story on Agency*.

We think it may be properly said that *Denison v. Seymour* is the leading case and *Story on Agency* the leading text recognizing the exception.

It is submitted that the reasoning of *Denison v. Seymour*, is unsound. It is:

The master of a merchant vessel serves voluntarily; he may choose his own officers. If the owners insist on incompetent officers the master is at liberty to leave the service; therefore, having voluntarily taken the ship and approved of his subordinates, he is responsible for their negligence.

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entire loss. The language quoted by the Circuit Court of Appeals in the case at bar should be read in context with the opinion in the *Belvedere* case. So read the above mentioned distinctions appear at once and it also becomes plain that the Pennsylvania District Court was not dealing with the question of the master's contributory liability alone but of the contributory obligation of the entire personnel of the ship, master, officers and crew included.

The result, we respectfully suggest, is a *non-sequitur*. It may be that the master should be responsible if he negligently employs or negligently approves the employment of incompetent subordinates; but there is no sound reason why he should be responsible for the negligent acts of a licensed officer not known to him to be incompetent.

Denison v. Seymour cites for its holding

Bowcher v. Noidstrom, 1 Taunt. 568; 127 Eng. Rep. 954,

and

Foot v. Wiswall, 14 Johns, 304.

The *Denison* opinion says that in *Bowcher v. Noidstrom*

> "*it seemed* to be taken for granted that the captain was liable, and the court *seemed* to acknowledge the principle that the master was liable for the conduct of a pilot on board his vessel; but that was an action of trespass, and the captain had done no act. They directed a non-suit." (The italicizing is ours.)

Reference to *Bowcher v. Noidstrom*, decided in 1809, shows that it is far from definite authority that the ship master is liable for the negligent acts of his inferior officers, and of this case Lord Justice Best said in *Hall v. Smith*, 2 Bing. 156; 130 Eng. Rep. 265:

> "In Bowcher v. Noidstrom (1 Taunt. 568) Lawrence, J. mentions the case of the captain of the 'Russell' man of war who was held answerable for the act of one of the lieutenants, who had command of the watch, in running down an Indiaman, whilst the captain was asleep in his cabin. When or by whom that case was decided I do not know; but it is

> supported by no other decision that I am aware of, and its authority is shaken by the judgment of the case in which it is cited."

Foot v. Wiswall, the other authority cited to the point in the *Denison* case contains no discussion of the question.

Story on Agency, 7th Ed., Sec. 313, recognizes the general rule that the middle man is not liable for the tortious acts of an under servant. In Section 314 the learned author states that the case of a shipmaster is an important exception to this general rule. In Section 315 it is stated that this exception to the general rule is adopted in the maritime jurisprudence of the modern commercial nations of continental Europe, it having been derived from the same common source—the Roman Law. And in text and footnote the writer refers to the Digest of Justinian and other ancient texts. Mr. Justice Story predicates this exceptional liability of the master principally on the ground that masters of ships, though the agents or servants of the shipowners, are treated "as in some sort a subrogated principal and qualified owner of the ship, possessing authority in the nature of the exercitorial power for the time being". In Chapter III of this brief (p. 21 infra) we present the considerations which show we think that *Story's* exception is predicated on conditions no longer existent and that his premise accordingly fails. *Story* also says that the imposition of this personal liability on the master will tend to induce a superior watchfulness over the conduct of his subordinates; but that could be said of any middleman. *Story* relies on *Denison v. Seymour* and quotes extensively in a footnote

from the opinion in that case; but as we have already suggested the decision in that case is a *non-sequitur* from the reasoning.

With *Story's* exception based on conditions no longer existent and *Denison v. Seymour* based on a *non-sequitur* and the other cases listed above based on either *Story* or *Denison v. Seymour* or simply announcing the rule without reasoning or authority, we submit that there is no longer, if there ever was, an exception in the case of shipmasters to the established rule that the intermediate agent is not liable for negligent acts of subordinates. That the other cases listed above are based either on *Story* or *Denison v. Seymour* or announce the rule without reasoning or authority will be seen from a review of them.

Foot v. Wiswall is in the last category. *Kennedy v. Ryall* relies on *Denison v. Seymour* and *Story*. The first Louisiana case, *Buel v. N. Y. Steamer* relies on *Story* and on *Burke v. Clarke*, 11 La. Rep. 206. This latter case is not in point. It held that a master who was part owner was jointly and severally liable with his partner. *The City of New York*, 25 Fed. 149 (1885) is based on *Story* and apparently on that basis alone gives it as the general rule in English and American law that the master is liable for the tortious acts of his subordinates.

Examination of other texts which recognize the exception to the general rule.

Shearman & Redfield on Negligence, 6 Ed. Vol. 2, Sec. 246, p. 712;

36 *Cyc.* 150;

11 *C. J.* 1172.

Spencer on Collisions, Sec. 182;

Kay on Shipmasters and Seamen, Vol. 2, p. 1153,

discloses that they are substantially based on *Story* or the other authorities we have reviewed, or on other old cases which are not in point. For instance, *Spencer* cites only *The Lotty,* 15 Fed. Cas. No. 8524 (1846) in his support. In that case the master was personally negligent, in suffering his vessel to remain inadequately moored in the face of an approaching and increasing storm of which he had ample warning.

It does not seem to us that it can reasonably be said that this alleged exception to the general rule has been generally accepted in this country and England. The two Louisiana cases above referred to are overruled, we think, by the case of

Le Blanc v. Sweet, 31 So. 766 (La.).

In this case the Supreme Court of Louisiana held that

> "Where an action in damages is brought against the owner and also the master of a steamboat, and it appears that in the transaction out of which the action arose the master was acting in his representative capacity, the owner alone is liable." (Syllabus by the Court.)

In the body of the opinion it is stated:

> "As to the defendants, it appears that the boat belonged to Daniel E. Sweet, and that Henry L. Sweet occupied the position of master and engineer. Under these circumstances, we find no reason for holding the latter liable."

The case was one where a passenger was drowned in disembarking from a vessel, owing to the negligence of

the ship's officers, in which the master had no part.

See also

De Harde v. Magdalena, 24 La. Ann. 267.

The law of England is assuredly contrary. We have already adverted to the criticism of *Bowcher v. Noidstrom* by Lord Justice Best in *Hall v. Smith,* 2 Bing. 156 (p. 15, supra).

In Volume 26 of *Halsbury's Laws of England* at page 526, Section 771, on the liability of the master in the chapter on collision, reads:

> "The master is liable for damage arising from his own negligence or breach of contract made with the owner of cargo shipped on his vessel; but he is not liable for the damage done by an act of the crew or of the pilot, whether done in the course of their duty to the shipowner or not, unless ordered by him."

In the chapter on Liability for Collisions, the 8th Edition of *Marsden on Collisions at Sea,* page 73, opens with the following passage, citing in footnotes with obvious disapproval *Story* and *Denison v. Seymour,* supra:

> "The person primarily liable in damages to the sufferer by collision is he by whose negligent act the loss was occasioned. The shipowner navigating his own vessel, the master, mate, pilot or other person in charge of the ship, who gave a wrong order to the helm, the helmsman who directed the ship's course wrongly, the seaman on the lookout who negligently failed to see and report the approach of the other vessel, may all be sued as wrongdoers, and are liable for damages.
>
> Thus when an action was brought against a pilot on board a King's ship for injury to the plaintiff's ship by the King's ship, it was held by Lord Ken-

yon that, though the pilot might be obliged to act in obedience to the order of the lieutenant in command of the King's ship, yet the pilot would be liable, if the collision happened by his personal misconduct. Upon proof, however, that the collision occurred by reason of an alteration of the helm ordered by the lieutenant, the plaintiff was non-suited.

It has been said that the master is liable for the negligent and wrongful acts of his crew as well as for his own acts. His liability as carrier, unless specially limited, may extend so far,* but in no reported case has he been held liable in tort for wrongful acts of the crew. For wilful injury to another ship by pilot or crew he clearly is not liable."

In *Clancy v. Harrison* (1878) 4 Vict. L. R. 437, the Supreme Court of Victoria held that a master of a ship is not liable for injuries occasioned by the negligence of the crew. In the *Per Curiam* decision the court said:

"Conceding that there was evidence of negligence of anyone, the defendant is not answerable for the negligence of another fellow servant, even if the owners would have been liable; in any aspect there was no evidence to give to the jury."

To recapitulate: There are three cases in one state, New York, and one Federal District Court case holding a master liable under these circumstances. The authorities in Louisiana, England and Canada are *contra*. We think it may be properly said that the statements in the American texts as to the law on this subject are un-

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*It should be noted that cases involving the master's liability for damage to cargo where he has signed bills of lading as master and not as agent, are not in point. In such cases he makes himself personally liable in contract. See *Carver on Carriage of Goods by Sea*, Sec. 47.

warranted and we doubt whether there has ever been a *settled* rule on this question.

This court has never, so far as we can discover, passed on the question. Number 14 of this court's Rules in Admiralty provides:

> "In all suits for pilotage or damage by collision, the libelant may proceed *in rem* against the ship and/or *in personam* against the master and/or the owner."

It is our understanding that this is a rule of procedure not of liability; that is to say it is to be construed as allowing the master to be joined as party respondent with the ship and/or the shipowner. We do not understand that the rule is to be read as prescribing liability against the master for negligent acts of subordinate officers in which he had no participation.

III.

ASSUMING THAT THE RULE ONCE EXISTED THAT A SHIPMASTER IS LIABLE FOR THE NEGLIGENT ACTS OF HIS SUBORDINATES, THE REASON FOR SUCH HARSH DOCTRINE HAS CEASED TO EXIST AND THE RULE SHOULD NO LONGER BE APPLIED.

1. The considerations which may possibly have warranted the imposition of such liability are not present under modern conditions of ship operation.

It will be noted that the principal basis for Mr. Justice Story's statement was that masters are treated "as in some sort a subrogated principal and qualified owner of the ship, possessing authority in the nature of the exerci-

torial power for the time being". The conditions described by Story were no doubt true of shipping in ancient times and the rule of the Roman law and the ancient maritime codes to which he refers were appropriate to those conditions. But even in Mr. Justice Story's time it had been judicially recognized that ships were being operated under radically different arrangements. Thus in 1831 (Story's work was published in 1839) Judge Ware of the District Court of Maine in the case of

The Rebecca, 20 Fed. Cas. No. 11619,

had before him the question of whether a vessel was liable, in specie, to answer for the loss or damage, by the fault of the captain, of goods which were taken to be transported on freight. Judge Ware made an exhaustive search of the codes and ordannances of the maritime law regarding the relationship of the master of the vessel and its owners. In the course of his discussion he made the following observations directly pertinent to our problem:

> "The custom which exempted the owners from personal responsibility for the acts of the master, extended, as has been observed, as well to obligations arising ex contractu as ex delicto. No distinction was made between them, and on the principles upon which the custom stood in its origin and in the time of the Consulate of the Sea, there does not appear to be any just ground for a distinction. The master, who was, in point of fact, ordinarily, if not always, a part owner, was considered as the head and acting partner in a commercial enterprise, and not as the agent of the owners of the vessel, and merchants dealt with him and trusted him in that character. And this was the character which the maritime legislation and jurisprudence of the times attributed to him.

But since the age of the Consulate, a great revolution has taken place in the state of civil society, and the reasons of public policy, in which the custom originated, have, in a great measure, ceased to exist. In consequence of the increased facilities of communication between nations, the greater security of maritime commerce, the vast augmentation of commercial capital, and the elasticity and vigor communicated to maritime adventures by the invention of the contract of insurance, extensive commercial enterprises are brought within the means of individual capitalists, and the union of a number of fortunes has become unnecessary for the carrying on of commercial operations with safety and success, even upon a large scale. During the same period, a gradual and silent change has been operated in the relations of maritime commerce. *The character and authority of the master of a vessel has fallen from that of the chief and the acting and responsible head of a maritime adventure, to that of the stipendiary agent or praepositus of the owners of the vessel. This change in the character of the master, should naturally be followed by a corresponding change in his authority and liabilities.*

It is a rule of natural law, incorporated into every system of jurisprudence, that the contract of an agent, acting in the name of his principal, and within the limits of his authority, binds the principal, but does not, unless he exceeds his authority, bind himself. The contract of the agent is the contract of the principal, entered into through the medium and instrumentality of the agent. It is, therefore, directly binding upon him, as his own contract. It is also obligatory upon him on the principles of natural equity. He has the benefit of the contract, and in justice ought to bear its burden. But as the agent contracts in the name of another, and derives no personal advantage from the contract, there is no reason for holding him personally bound to fulfill its obligations.

> Looking upon the master of a vessel, therefore, as the simple agent of the owners, acting in their name and for their benefit, upon the plainest deductions of reason, as well as upon the principles of natural equity, his contracts, within the legitimate scope of his authority, ought to be personally binding on the owners, and, for the same reasons, they ought not to be personally obligatory upon himself. *A just application of principles to the altered relations of the master to the owners, will reverse the ancient custom as to their liabilities.*" (Italics ours.)

If the foregoing observations are true of conditions in 1831 how much more applicable they are to conditions today. It may be that in earlier times, when masters of vessels were almost always part owners; when a vessel would leave its home port to trade in all parts of the world for several years without return, that it was proper to hold the master personally responsible for the negligence of his inferiors. But times had changed by 1831. At that time it was recognized that the master had become only the stipendiary agent of the owners of the vessel.

Today it is a matter of common knowledge that he is rarely even that. The day of the tramp schooner is practically gone. As a general rule vessels have regular routes and regular ports of call. This was the situation of the Newport. Steamships are owned in the main by large corporations; port captains employ the officers; officers and clerks on shore supervise the receipt and discharge of cargo and pay the bills in connection therewith. The master today is little more than a navigator.

Judge Neterer of the District Court in Washington has recently commented on the changed situation of the master of a vessel in

Everett v. U. S., 277 Fed. 256.

This was an action by seamen against the master of the vessel on which they had signed articles. The form of articles which must be signed is prescribed by Section 4612, R. S.; Schedule, Table A. Under this form the master personally contracts to pay the seamen their wages. The court deprecated the statutory necessity for holding the master liable and expressed a strong opinion relative the injustice of the situation, saying:

> "Under the shipping articles the master is obligated to pay the wages of the seamen. This is an extreme hardship, brought on by no fault of the master. It is a liability which was not contemplated by either the master or the seamen. The master lost his earnings on the voyage, he could not even participate in the proceeds of sale of the vessel, and now to be adjudged liable for the unpaid wages of the seamen will take from him all his savings, and the provision made for the education of his children, and leave his family destitute, except such exemptions as are given by law to the head of a family. The form of article is provided by section 4612, R. S., 'Schedule' 'Table A' (Comp. St. Sec. 8392). This form was adopted when the relation of the master to the ship and to the owner was very different from that of the present time. The reasons for this stipulation, it would seem, do not obtain in the modern shipping world, and a change should be made, but it cannot be made by the court."

The District Court in the foregoing case was forced to hold as it did because the statute admitted of no other

decision. This court is under no such compulsion in the present instance. No statute is involved. The few authorities (none recent) which have passed on this question are in conflict. Even if it can be said that the decisions pronouncing the old harsh doctrine are preponderant, they do not issue from courts which would warrant this court in following them for any reasons of comity or the like. Nor have any rights in property become fixed which might justify the further promulgation of an unsound and cruel rule.

And if there ever was a valid reason for the doctrine announced by *Story* and *Denison v. Seymour* we submit that it is now non-existent. The day has long since gone by when, in the words of *Story,* a master of a vessel is "a sort of a subrogated principal and qualified owner of the ship". As a master is not an owner, or a "qualified owner", we submit that the principle of *respondeat superior* should not be applied to him.

It seems to us that it would be a very harsh doctrine that would hold the modern salaried shipmaster liable for tortious acts of the subordinate ship's officers where the master himself has not been negligent. It is plainly impossible for a shipmaster to be always on the bridge. If the ruling of the Circuit Court of Appeals is upheld every shipmaster is faced with the prospect of having his entire life's savings swept away by the negligent act of a subordinate while he is properly asleep in his cabin.

2. The reasons for the rule having ceased, the authorities applying it should not be followed. "Cessante ratione legis cessat ipsa lex."

Entirely apart from the authorities recognizing the changed status of a shipmaster, it is a matter of common knowledge that a master today is merely a principal servant of the owner of the vessel. No reason exists today (if it ever existed) for making his case an exception to the general rule of non-liability of intermediate servants.

> "It is a well settled rule that the law varies with the varying reasons on which it is founded. This is expressed by the maxim, *'cessante ratione, cessat ipsa lex.'* This means that no law can survive the reasons on which it is founded. It needs no statute to change it; it abrogates itself. If the reasons on which a law rests are overborne by opposing reasons, which in the progress of society gain a controlling force, the old law, though still good as an abstract principle, and good in its application to some circumstances, must cease to apply as a controlling principle to the new circumstances."
>
> *Beardsley v. Hartford,* 50 Conn. 529, 541.

We respectfully pray that this court review the judgment of the Circuit Court of Appeals deciding that your cross-petitioner, the master of the Newport, was properly held liable for the negligence of the third officer of that vessel.

Dated at San Francisco, California,
January 22, 1927.

EDWARD J. MCCUTCHEN,
WARREN OLNEY, JR.,
FARNHAM P. GRIFFITHS,
Counsel for Cross-Petitioners.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1926

No. 744

PACIFIC MAIL STEAMSHIP COMPANY, a corporation, (Respondent, Claimant and Cross-Libelant),

STEAMSHIP "NEWPORT", her engines, boilers, tackle, etc., J. McKINNON, Master of said vessel,

Cross-Petitioners and Respondents,

vs.

HENRY WILSON, F. A. WILSON, W. T. WILSON, LUCY W. KENDALL, A. KENDALL, MARY TROWBRIDGE, Administratrix of the Estate of A. J. PATTERSON, deceased, JAS. PENNYCOCK, O. BERTELSEN, J. S. HUTCHINSON, E. C. HUTCHINSON, HELENA ALLEN, A. B. JOHNSON, KATIE M. JOHNSON, MARIETT JOHNSON, A. HANSEN, CLARA A. BUCHHOLZ, H. W. JACKSON, L. EVERDING, FRANK GRAHAM, MARGARET A. WILSON, Trustee, CARRIE E. WILSON, J. H. WILSON, MARGARET A. WILSON, WM. C. WILSON, JAMES GRAHAM, B. P. NELSON (Libelants and Cross-Respondents), KARL ROHBERG, CHARLES S. SEMSEN, JAMES HAYES, C. H. ANDERSON, HARRY WALTON, W. SARRIS, GUST ANDERSON, GUST SAARINEN, WM. R. REILLY, LOUIS NORLOFF, JOHN MCDONALD, WILSON BANGAY, ROBERT WHITE, GEORGE DOLAN, JOHN LEWIS, SETT STRAND (Libelants),

Cross-Respondents and Petitioners.

Notice of Filing Cross Petition.

The cross-respondents in the above entitled cause and their proctors will please take notice that a cross petition for a writ of certiorari, together with the supporting brief, of which the foregoing are true and correct copies, were filed with the Clerk of the Supreme Court of the United States, at Washington, D. C., on the..... day of....., 1927.

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Proctors for Cross-Petitioners.

ADMISSION OF SERVICE.

Due service of the foregoing notice, and receipt of a copy of said notice together with a copy of the cross petition, printed record and supporting brief, is hereby admitted this.....day of.....,
1927, at San Francisco, California.

.....,

.....,

Proctors for Cross-Respondents.

25

In the Supreme Court
OF THE
United States

Supreme Court, U. S.
FILED
DEC 28 1926
WM. R. STANSBURY
CLERK

OCTOBER TERM, 1926.

No. [redacted] 146

HENRY WILSON, F. A. WILSON, W. T. WILSON, LUCY W. KENDALL, A. KENDALL, MARY TROWBRIDGE, Administratrix of the Estate of A. J. Patterson, Deceased, JAMES PENNYCOCK, O. BERTELSEN, J. S. HUTCHINSON, E. C. HUTCHINSON, HELENA ALLEN, A. B. JOHNSON, KATIE M. JOHNSON, MARIETT JOHNSON, A. HANSEN, CLARA A. BUCHHOLZ, H. W. JACKSON, L. EVERDING, FRANK GRAHAM, MARGARET A. WILSON, Trustee, CARRIE E. WILSON, J. H. WILSON, MARGARET A. WILSON, WM. C. WILSON, JAMES GRAHAM, B. P. NELSON, (Libelants and Cross-Respondents), KARL ROHBERG, CHARLES S. SEMSEN, JAMES HAYES, C. H. ANDERSON, HARRY WALTON, W. SARRIS, GUST ANDERSON, GUST SAARINEN, WM. R. REILLY, LOUIS NORLOFF, JOHN MCDONALD, WILSON BANGAY, ROBERT WHITE, GEORGE DOLAN, JOHN LEWIS, SETT STRAND, (Libelants),

Petitioners,

vs.

PACIFIC MAIL STEAMSHIP COMPANY (a corporation), (Respondent, Claimant and Cross-Libelant), STEAMSHIP "NEWPORT", her engines, boilers, tackle, etc., J. MCKINNON, Master of said vessel,

Respondents.

Brief on Behalf of Respondents Opposing Petition for Writ of Certiorari.

EDWARD J. MCCUTCHEN,
WARREN OLNEY, JR.,
FARNHAM P. GRIFFITHS,
Balfour Building, San Francisco,
Counsel for Respondents.

Summary of the Brief.

I.

THE BASIS OF THE DECISION OF THE CIRCUIT COURT OF APPEALS.

1. It states the rule to be applied as announced by this Court in the Delaware, The New York, and The Sunnyside.

2. It recognizes that the privileged vessel should not depart from her course and speed except when she receives distinct indication that the burdened vessel is about to fail in her duty, in which event it becomes the duty of the privileged vessel herself to act to avoid immediate danger.

3. It finds that under the evidence in this case it became "distinctly apparent" to petitioner's privileged vessel, the Svea, that the burdened vessel, the Newport, was about to fail in her duty, whereupon it became the duty of the Svea to act herself to avoid disaster.

4. It holds the Svea in mutual fault for the collision with the Newport, which had admitted her fault.

II.

PETITIONER'S ATTACK ON THE DECISION.

1. It accepts the law to be applied as stated by the Circuit Court of Appeals.

2. It misstates the holding of the Circuit Court of Appeals. Petitioner says that the Court held that the

Svea was merely *in doubt* as to whether the Newport was going to fail in her duty. The Court found that under the evidence reviewed it became "distinctly apparent" to the Svea that the Newport was about to fail in her duty.

3. It admits that the case involves no unsettled question of law.

4. It relies on the suggestion that the decision sought to be reviewed is in conflict with applicable decisions of this Court and in other circuits.

5. The semblance of conflict is obtained only by the misstatement of the holding of the Circuit Court of Appeals. There is no real conflict. The Circuit Court of Appeals is in harmony with the decisions of this Court and of the other circuits.

6. Petitioner's authorities merely show that where the courts *have not found* distinct indication, the privileged vessel *has not* been condemned for holding on; just as other authorities show that where the courts *have found* distinct indication, the privileged vessel *has* been condemned.

7. This petition merely seeks to review the finding of fact of the Circuit Court of Appeals that it became "distinctly apparent" to the Svea that the Newport was about to fail in her duty.

8. The petition presents no question of public importance.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1926.

No.

HENRY WILSON, F. A. WILSON, W. T. WILSON, LUCY W. KENDALL, A. KENDALL, MARY TROWBRIDGE, Administratrix of the Estate of A. J. Patterson, Deceased, JAMES PENNYCOCK, O. BERTELSEN, J. S. HUTCHINSON, E. C. HUTCHINSON, HELENA ALLEN, A. B. JOHNSON, KATIE M. JOHNSON, MARIETT JOHNSON, A. HANSEN, CLARA A. BUCHHOLZ, H. W. JACKSON, L. EVERDING, FRANK GRAHAM, MARGARET A. WILSON, Trustee, CARRIE E. WILSON, J. H. WILSON, MARGARET A. WILSON, WM. C. WILSON, JAMES GRAHAM, B. P. NELSON, (Libelants and Cross-Respondents), KARL ROHBERG, CHARLES S. SEMSEN, JAMES HAYES, C. H. ANDERSON, HARRY WALTON, W. SARRIS, GUST ANDERSON, GUST SAARINEN, WM. R. REILLY, LOUIS NORLOFF, JOHN MCDONALD, WILSON BANGAY, ROBERT WHITE, GEORGE DOLAN, JOHN LEWIS, SETT STRAND, (Libelants),

Petitioners,

vs.

PACIFIC MAIL STEAMSHIP COMPANY (a corporation), (Respondent, Claimant and Cross-Libelant), STEAMSHIP "NEWPORT", her engines, boilers, tackle, etc., J. MCKINNON, Master of said vessel,

Respondents.

Brief On Behalf of Respondents Opposing Petition for Writ of Certiorari.

THE BASIS OF THE DECISION OF THE CIRCUIT COURT OF APPEALS.

The decision of the Circuit Court of Appeals will be found at page 239 of the Record. The reasoning is

1. That the law to be applied is that stated by this Court in the *Delaware* (161 U. S. 459), the *Sunnyside* (91 U. S. 208) and the *New York* (175 U. S. 187).

2. That under that law the privileged vessel in crossing courses should not depart from her duty to hold her course and speed in the absence of distinct indication that the burdened vessel is about to fail in her duty to keep out of the way.

3. That while holding on as required by the rule, the privileged vessel should constantly observe the burdened vessel. That the primary duty imposed upon the former to keep her course and speed does not relieve her of the responsibility of deciding if and when it may become necessary to depart from the rule in order to avoid immediate danger.*

NOTE: For brevity we refer throughout this brief to the Petition and the Brief in support thereof as the Petition.

*Citing to these requirements the *Devonian*, 110 Fed. 588 and the *West Hartland*, 2 Fed. (2nd) 834. Petition (6, 26) takes exception to the statement in the *West Hartland* that when the privileged vessel is in doubt as to the course the burdened vessel intends to pursue she should resolve that doubt in favor of safety by blowing the danger signal or taking timely steps to avoid a collision before plunging herself into a position where collision will be the natural, if not the necessary, consequence.

The *West Hartland* was under the Inland Rules, Article XVIII, Rule 3 of which provides:

> "If, when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam-whistle."

The citation of the *West Hartland* in conjunction with this Court's decisions in the *Sunnyside*, (91 U. S. 208) the *Delaware* (161 U. S.

4. That if the privileged vessel receives distinct indication that the burdened vessel is about to fail in her duty to keep out of the way, the privileged vessel should herself, in accordance with the general prudential rule,* yield her right of way if necessary to avoid immediate danger.

5. That under the evidence in this case, taking into account all the facts and circumstances, it became "distinctly apparent" that the Newport (burdened vessel) was about to fail in her duty of keeping out of the way and that the Svea (though the privileged vessel) ought not to have stood on her right of way into the collision but should have yielded to avoid that immediate danger.

6. That the Svea did not do so and was consequently in mutual fault with the Newport which had admitted her fault.

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459) and the *New York* (175 U. S. 187) followed by the statement that "the principle upon which the cases cited rest must control" (R. 243) shows that the Circuit Court of Appeals was announcing no doctrine at variance with the rule that the privileged vessel is to hold her course and speed unless and until she receives distinct indication that the burdened vessel is about to fail in her duty when she herself must act to avoid immediate danger.

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*For convenience of reference we have printed in the Appendix:

The Starboard Hand Rule (Article 19 of the International Rules),

Articles 22 and 23 defining the obligations of the burdened vessel when that rule is operative,

Article 21 defining the primary obligation of the privileged vessel to hold her course and speed.

The Note to Article 21 and the General Prudential Rule and the Rule of Good Seamanship (Articles 27 and 29). The Note both in its own text and by reference to Articles 27 and 29 indicates the circumstances under which the privileged vessel herself should act to avert collision. The General Prudential Rule particularly has been the basis for the decisions that when the privileged vessel has distinct indication that the burdened vessel is about to fail in her duty, the privileged vessel herself must act to avoid immediate danger.

That is the decision. What is

PETITIONER'S ATTACK ON THE DECISION.

Petitioner accepts the law to be applied as stated by the Circuit Court of Appeals. It says that "the leading case on the questions raised here is the Delaware" (petition 18). It recognizes that the Svea should be held at fault for maintaining course and speed if she received "some distinct indication" that the Newport was not going to give way (petition 20-21).

Petitioner then misstates the holding of the Circuit Court of Appeals. It asserts that the substance of the decision is that the privileged vessel must give way if she has *doubt* (petitioner italicizing "doubt") "in regard to the navigation of the other vessel" (petition 3). Petitioner then proceeds to demolish the misstatement—knock down its straw man. But the Circuit Court of Appeals did not put its decision upon the ground that there was *doubt* whether the Newport would give way; but upon the holding based on a review of the evidence that it became *distinctly apparent*—which of course is only another way of saying that there was *distinct indication*—that the Newport intended to persist in her course. Then, under the authorities recognized by petitioner, it became the duty of the Svea to yield to avoid immediate danger.

Accepting, as we have said, the principle to be applied as stated by the Circuit Court of Appeals from decisions of this Court, petitioner says that it is not relying for the writ "upon the proposition that there is an unsettled question of law involved in this case" (petition 8). What it relies on is a suggestion that the decision of the Circuit Court of Appeals is "in conflict with the applicable

decisions of this Court, and with the decisions in other circuits" (petition 8-9). But to get the conflict (the law being settled and accepted by the Circuit Court of Appeals as the basis of its decision) petitioner has to put up its straw man—assert that the Circuit Court of Appeals found *doubt* whether the Newport would give way whereas the finding is *in terms* that it was *distinctly apparent* that she would not.

On this finding the suggested conflict—based on misrepresentation of the Court's holding and purely fictitious—vanishes and the decision is seen to be in harmony with the decisions of this Court and of the other circuits.

All that the petition develops in its review of authorities is that, in cases where the courts found absence of distinct indication the privileged vessel has not been condemned for holding on.* In the cases where the finding

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*Thus in the *Delaware* (161 U. S. 459) there was, as petitioner says, an unanswered whistle signal from the privileged vessel but petitioner overlooks that the privileged vessel thought, and was justified in thinking, that it *had been* answered. There was also a peculiarly local factor in the *Delaware* case. The approach of the burdened vessel was across a dredged channel and if she persisted in her course she would overrun it. There was, therefore, as the court said, "every reason to suppose" that she would alter course to starboard which would be in conformity with her obligation to the privileged vessel. This factor, in conjunction with the warranted impression that the whistle *had* been answered,— both peculiar to the case—are the nub of the decision that *in that case* the privileged vessel did not have distinct indication that the burdened vessel was going to persist in her course.

That is only another way of saying that each case of course must stand on its own facts in the matter of indication.

In the *Yang-Tsze* case (215 Fed. 859-petition 21) there appeared, as petitioner says, to be a deserted bridge but that is only one of the factors in the case at bar. The privileged vessel in that case, on its own testimony departed from the rule long before it was necessary to do so to avoid immediate danger—which of course is the basis for the application of the general prudential rule.

Similarly the *Binghampton* (271 Fed. 69), the *Haida* (191 Fed. 623) and the *Cygnus* (142 Fed. 85) referred to at pages 23 and 25 of the petition hold that on *their* respective facts there was no distinct indication to the privileged vessel of the burdened vessel's approaching violation. But *their* facts are not the facts of *this* case. The same observation applies to the cases listed on page 25 of the petition.

has been the other way, as here, the privileged vessel has been condemned.* The findings of fact—was there or was there not indication—naturally differ in the various cases according to the evidence; but the decisions based on those findings are truly in accord when they apply the accepted principle to the findings.

That is precisely what the Circuit Court of Appeals did in this instance. The suggestion of a conflict with decisions in the Second or other circuits or with the decisions of this Court (petition 8, 27) thus fails. To give the suggestion even the semblance of reality petitioner, as we have observed, had to represent the opinion as holding that *doubt* as to the navigation of the burdened vessel justifies departure by the privileged vessel; whereas the holding is *indication*—"made it distinctly apparent" (R. 244).

Finally in the last paragraph of the brief in support of the petition we have the recognition that the decision sought to be reviewed is based on a finding of indication.

> "The fact that the Circuit Court of Appeals thought that the master of the Svea must have had a *clear indication* from the Newport does not change the situation" (petition 27—italics ours).

This recognition of the fundamental finding on which the decision is based should have been given, we submit, in the petition itself and at the outset of the brief (documents which are supposed to be prepared with "studied

*See for example, *The New York* (175 U. S. 187), *The Admiral Watson* (266 Fed. 122), *The Tenadores*, (298 Fed. 740; 2nd C. C. A.), *The Coamo*, (280 Fed. 282; 2nd C. C. A.), *The Jason*, (288 Fed. 57), *The Senator Rice*, (223 Fed. 524; 2nd C. C. A.), *The Devonian*, (110 Fed. 588), *Nautik v. Oostvoorne*, (6 Lloyds List 110).

accuracy"—*Furness Withy & Company v. Yang-Tsze Insurance Association,* 242 U. S. 430); instead of being grudgingly yielded in the last paragraph of the brief.

Be that as it may we have in the concluding sentence of the last paragraph, petitioner's real quarrel with the decision: that it finds "clear indication" which petitioner thinks the evidence does not warrant. That is the whole burden of petitioner's real, though not of its ostensible, argument for this writ. It is asking certiorari for review of a pure finding of fact. It is not our understanding that certiorari is granted for that purpose. The question whether under the facts of this case there was or was not distinct indication that the burdened vessel was not going to give way is of interest to the parties but not to the public. It has been decided adversely to petitioner's view but that is not proper ground for petitioner's request to have it passed upon by another court. True, petitioner seeks to give a public flavor to its plea (petition 3). But how can the question whether there was or was not distinct indication under the particular circumstances of *this case,* which may never be repeated again or never repeated in the same combination, cumulation and setting be "of national importance to the shipping community" or "of particular importance to the masters of all vessels navigating the waters of the Pacific Ocean and tributaries within the jurisdiction of the Ninth Circuit" (petition 3)? If it were, this Court would be called upon to review the particular facts of each case that arises to see whether indication or non-indication, as the case might be, had been properly found. Petitioner of course appreciates that

this cannot be so and injects into its petition the false quantity of doubt, to which we have adverted, thereby intimating that it is a misstatement of the rule which it seeks to have reviewed (and which might be of public consequence) instead of a finding of fact under a correctly stated rule.

We do not anticipate, therefore, that the Court will care to enquire into the merits of the finding. We merely refer accordingly to the evidence recited in the opinion and respectfully submit that it amply sustains the finding that it was distinctly apparent that the Newport was about to fail in her duty to keep out of the way of the Svea whereupon it became the duty of the Svea to give way herself to avoid immediate danger.

Petitioner claims that "the conclusion arrived at by the Circuit Court of Appeals should not be permitted to override" the testimony of the master of the Svea that "he thought that the Newport would change and go clear" (petition 27). But it is elementary of course that the test is objective, not subjective, and the question is not whether the circumstances of the case in fact gave distinct indication to him, that the Newport was about to fail in her duty, but whether they would have given such indication to any competent shipmaster in his situation. The reason the Svea's master "thought that the Newport would change and go clear" despite the distinct contrary indications was apparently that he had the right of way and it was the duty of the other vessel to keep out of the way (see excerpts from his testimony at page 13 of the petition and R. 213). In other words he thought the Newport

would yield because it was her duty to do so. That would excuse any shipmaster for ignoring all distinct indications that the burdened ship was not going to comply with the rule. It seems quite apparent from the master's testimony (petition 13-14) that he knew only the starboard hand rule itself—his right of way and the obligation of the Newport to keep clear of him. He seems to have been wholly unaware of the General Prudential Rule under which the privileged vessel also must act to avoid immediate danger when she has distinct indication, as the Svea had here, that the burdened ship is going to fail.

As this Court said in *The New York* (175 U. S. 187) quoting from *The Sunnyside* (91 U. S. 208):

> "Cases arise in navigation where stubborn adherence to a general rule makes a culpable fault, for the reason that every navigator ought to know that rules of navigation are ordained, not to promote collision, but to save life and property by preventing such disasters."

It is respectfully submitted that the application for certiorari should be denied.

EDWARD J. MCCUTCHEN,
WARREN OLNEY, JR.,
FARNHAM P. GRIFFITHS,
Counsel for Respondents.

Dated San Francisco, California,
December 24, 1926.

ENTRY OF APPEARANCE.

The undersigned hereby enter their appearance in the above entitled court as counsel for respondents.

EDWARD J. MCCUTCHEN,
WARREN OLNEY, JR.,
FARNHAM P. GRIFFITHS,
Counsel for Respondents.

ADMISSION OF SERVICE.

Due service and receipt of a copy of the within brief is hereby admitted this.....day of....., 1926.

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Counsel for Petitioner.

(APPENDIX FOLLOWS.)

Appendix.

ARTICLES OF THE INTERNATIONAL RULES INVOLVED IN THIS CASE.

Article 19—Starboard Hand Rule

"When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other." (26 Stat. 327.)

Article 22—

"Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other." (26 Stat. 327.)

Article 23—

"Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse." (26 Stat. 327.)

Article 21—

"Where, by any of these rules, one of two vessels is to keep out of the way, the other shall keep her course and speed." (26 Stat. 327.)

Note to Article 21—

"When, in consequence of thick weather or other causes, such vessel finds herself so close that collision can not be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision." (See Arts. twenty-seven and twenty-nine.) (26 Stat. 327.)

Article 27—General Prudential Rule

> "In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger." (26 Stat. 327.)

Article 29—Rule of Good Seamanship

> "Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case." (26 Stat. 327.)

The Courts are therefore constantly cautioning that no vessel has a right of way to run into disaster.

> "Rules of navigation are ordained to preserve life and property and not to permit or authorize collision. Even flagrant fault committed by one of two vessels approaching each other from opposite directions, will not excuse the other from adopting every proper precaution to prevent a collision."
>
> *The America,* 92 U. S. 432, 438.

> "As was said in the case of the Sunnyside, 91 U. S. 208, 222: 'Cases arise in navigation where stubborn adherence to a general rule makes a culpable fault, for the reason that every navigator ought to know that rules of navigation are ordained, not to promote collision, but to save life and property by preventing such disasters.' "
>
> *The New York,* 175 U. S. 187.

> "No code of navigation gives leave to run into collision; the saving rule of special circumstances

flavors every other rule with the salt of precaution and common sense."

La Lorraine, 12 Fed. (2nd) 436, 437 (2nd C. C. A.).

"The primary purpose of rules of navigation as said by the Supreme Court, is not to fix arbitrary rights of the road to vessels, but rather for the safety of life and property."

The Admiral Watson, 266 Fed. 122.

"But over and underlying all the rules of navigation is that rule of common sense, so often referred to, that no one has the right to run into collision."

The George S. Tice, 287 Fed. 127 (2nd C. C. A.),

"Where property and life are at stake, neither party should insist upon persisting in a course which is likely to result in disaster, when the delay of a few minutes will insure the safety of both."

The Senator Rice, 223 Fed. 524 (2nd C. C. A.).

"But the privileged vessel is to hold her course, constantly observing the burdened vessel in order to note if the latter fails in her duty. When the failure of the burdened vessel becomes apparent, the privileged vessel must change her course, as prudence commands."

The Devonian, 110 Fed. 588.

"No privilege exempts a vessel from using ordinary common sense to escape from danger."

The Southern, 224 Fed. 210.

"As was held in the John H. Starin, 162 Fed. 146, 89 C. C. A. 170, there is no right of way on which a

vessel is entitled to insist, when it is obvious that it will result in collision."

The Jason, 288 Fed. 57, 61.

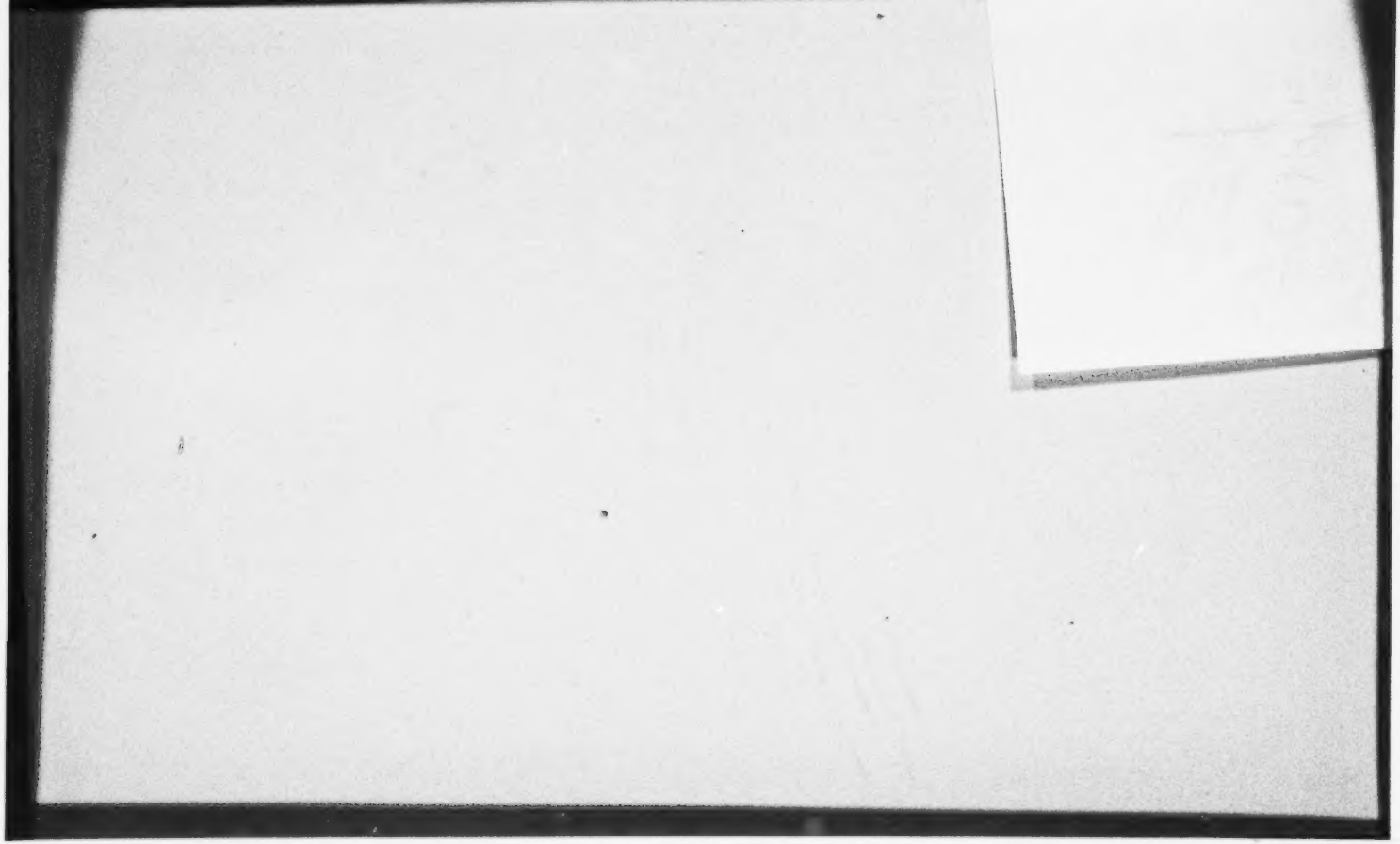
"There is no such thing as a 'right of way' to run into unnecessary collision. The rules of navigation are for the purpose of avoiding collision; not to justify either vessel incurring a collision unnecessarily. The supreme duty is to keep out of collision."

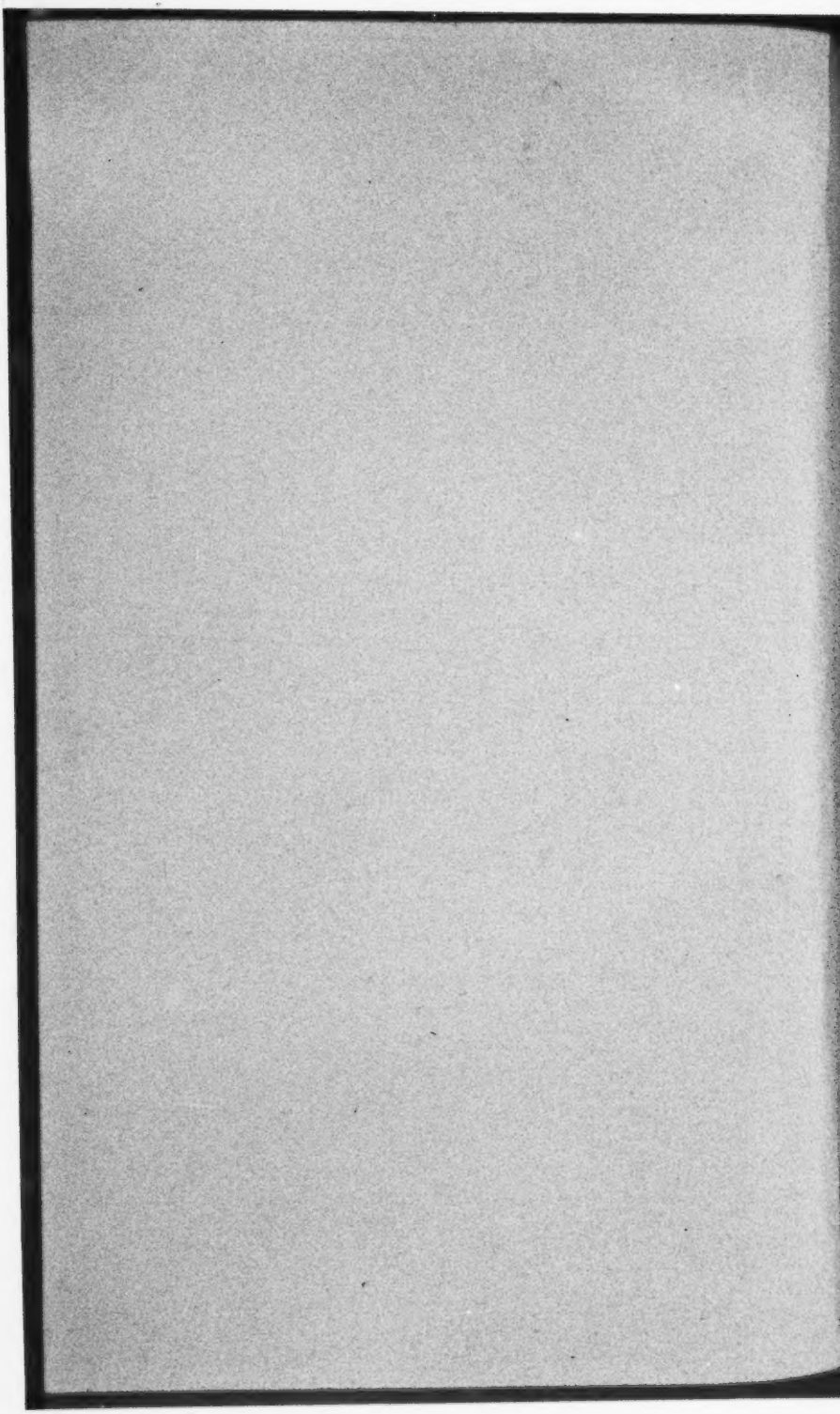
The Non Pareille, 33 Fed. 524, 526.

"Whenever danger of collision has become manifest, and the vessel previously bound to avoid it is plainly neglecting her duty to do so, the circumstances are special, and the other vessel must do what she can to prevent disaster. If this rule were not acted on and rigidly enforced, disastrous collisions would arise daily, and the lives and property of innocent persons be sacrificed to a tenacious adherence to the mere right of way; * * *."

The Aurania and The Republic, 29 Fed. 98, 126, 127.

end





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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1927

Nos. 146 and 173.

HENRY WILSON, F. A. WILSON, W. T. WILSON, et al.,

Petitioners,

vs.

PACIFIC MAIL STEAMSHIP COMPANY, STEAMSHIP NEWPORT, her engines, boilers, tackle, etc., and J. MCKINNON, Master of said vessel,

Respondents.

} No. 146

PACIFIC MAIL STEAMSHIP COMPANY, Claimant of the STEAMSHIP NEWPORT, her engines, boilers, tackle, etc., and J. MCKINNON, Master of said vessel,

Cross-Petitioners.

vs.

HENRY WILSON, F. A. WILSON, W. T. WILSON, et al.,

Cross-Respondents.

} No. 173

BRIEF FOR RESPONDENTS IN CASE No. 146.

STATEMENT OF THE CASE.

THE CAUSES IN CAPTION—CERTIORARI ON PETITION AND CROSS-PETITION—CONSOLIDATION FOR HEARING IN THIS COURT—CASE IS COLLISION IN ADMIRALTY—POINTS INVOLVED—THIS IS RESPONDENTS' BRIEF IN CAUSE 146—CROSS-PETITIONERS' BRIEF IN CAUSE NO. 173 ALREADY FILED.

These two causes are here on petition and cross-petition for certiorari which has been granted in each. They involve review of a single case below (though each is concerned with a different aspect of it) and were consolidated for hearing in this Court by order entered May 16, 1927. Petitioners in Cause No. 146 are cross-respondents in Cause No. 173 and vice versa.

The case is in admiralty. The steam schooner Svea and the steamer Newport were in collision, November 29, 1922. The Svea interests libeled and the Newport interests cross-libeled. The Newport admitted fault, asserting, however, that the Svea was also to blame; pleaded, in other words, that it was a mutual fault collision. The Svea denied fault and pleaded that the collision was due to the sole fault of the Newport.

The District Judge held the Newport solely at fault (63)* and entered up a decree (55) against the Newport and her owner, Pacific Mail Steamship Company; also against George (J.) McKinnon,** her master. While admitting fault, as above stated, the Newport pleadings denied the master's personal participation therein (30).

---

*Figures in parentheses, except where otherwise specified, refer to pages of the Record.

**Captain McKinnon was called "J" McKinnon in the Svea's original libel, and that description has continued through the titles of the pleadings, etc., though "George" McKinnon is the correct name. (33, 104.)

The owners of the Newport and Captain McKinnon appealed from the judgment of the District Court, upon the ground that the court erred in not holding the Svea in mutual fault with the Newport and in entering any judgment against Captain McKinnon. The Circuit Court of Appeals for the Ninth Circuit reversed that part of the judgment holding the Newport solely at fault and held both vessels to blame. It affirmed that part of the judgment holding Captain McKinnon personally liable for the negligence of the Newport's third officer.

These are the two branches of the case and the points of the two writs of certiorari. Petitioners in Cause No. 146 ask review of the finding of mutual fault. They are the owners of the Svea. Their claim is that the Newport should be held solely to blame for the collision and the Svea exonerated. Their petition was filed November 29, 1926, and certiorari was granted January 10, 1927.

Cross-petitioners in Cause No. 173 ask review of the personal judgment against the Master of the Newport. The cross-petitioners are the owner and master (Pacific Mail Steamship Company and George—J.—McKinnon) of the Newport. Their claim is that both the courts below erroneously held Captain McKinnon personally liable for the negligence of his subordinate officer—that, however the case may finally fall as to fault for the collision as between the two vessels and their owners, he should be relieved. The cross-petition was filed January 28, 1927, and certiorari was granted March 14, 1927.

This is the brief for the respondents in Cause No. 146. It deals with the question whether the Newport alone is

to blame for the collision as held by the District Court or whether it is properly a case of mutual fault as held by the Circuit Court of Appeals.

We have a separate brief on file on the cross-petition in Cause No. 173, dealing with the question of the soundness of the personal judgment against the Newport's captain.

THE STORY OF THE COLLISION.

The place of the collision was in the Pacific Ocean, about 12 miles off the shoreline north of San Luis Obispo Bay, California, and the time 9:53 in the morning. The vessels were approaching on converging courses and were in view of each other from the time they came on the horizon under a visibility variously estimated from 10 to 20 miles. It was a bright, sunny morning; the sea calm and the wind negligible. No other vessels were in sight. In short, the conditions were ideal for the avoidance of collision. There could hardly be a more perfect setting for that kind of a collision which the courts have often said it is hard to conceive as occurring without *mutual* fault.

The Newport was southbound from San Francisco to South American ports; the Svea northbound from Ventura, California, to San Francisco. The crossing courses (that of the Newport south 79° east magnetic and that of the Svea northwest by north ½ north magnetic) were such that from the time the vessels were in view of each other the Newport had the Svea on her starboard side

about 3 points off her starboard bow, and the Svea similarly had the Newport about 3 points off her port bow. From the time the two vessels came in sight of each other, long before the collision and right up to the collision, the bearings never changed. Thus, from beginning to end, the risk of collision existed.* Traveling at their respective full speeds of 10 knots for the Newport and 7½ knots for the Svea, the two ships went without alteration of course** or slackening of pace*** straight up to the fatal, and under these conditions, inevitable point of intersection and collision.

The collision was about right-angled, stem of the Newport to amidships of the Svea, and both vessels sustained heavy damages. It looked to the Svea at first as if the Newport were going to sink (189), but she made port under her own power without mishap. The Svea, despite the efforts of her officers and crew, turned over on the evening of the collision, but was afterwards towed into San Francisco and repaired.

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*Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist.
(Preliminary Note to Steering and Sailing Rules, 26 Stat. 326.)

**The Svea ported 100 feet before the impact, but this was within seconds of the collision, and according to her master (187) and mate (153) she did not feel the helm. In other words, for all practical purposes she continued her course right up to the collision.

So did the Newport. An answer to an interrogatory says that her helm was put hard astarboard before the collision (33), but there is no very distinct evidence of this (124), and the Newport's cross-libel admits that she maintained her course until less than a minute immediately preceding the collision (21). At any rate the Svea was at all times until about 9:53 a. m.—the collision time—on the Newport's starboard bow (148), and we make no claim of any change of bearing as the vessels drew together or of any helm action by the Newport to fulfill her duty to go under the Svea's stern.

***The Svea stopped her engines as the vessels came together (154, 203). At this time the Newport's engines were going full astern (122), but they had only just been put so, as it is agreed on both sides that there was no alteration of bearings up to the collision, and the Newport pleadings admit failure to slacken speed, stop or reverse on approaching the Svea.

The Newport, as we have stated, admitted fault from the outset—that is to say, in the pleadings (21, 31).

Under the International Rules, which are related and discussed below*, the Newport was the giving-way vessel and was required to keep out of the way of the Svea. She failed to do so, though she had the wide ocean and a clear day in which to maneuver, and we neither pleaded, nor attempted to prove, any excuse.

The master of the Newport, Captain McKinnon, had stepped off the bridge some twenty minutes before the collision to go below, leaving the bridge in charge of his duly licensed third officer, who was on his regular watch there (105, 117). The captain while in the lavatory caught a glimpse of the oncoming Svea through a port hole just before the collision and rushed to the bridge in time to see it occur, but without opportunity at that last moment to do anything to avert it (105).

Svea counsel took the deposition of the third officer, and he testified that he saw the Svea eight minutes before the collision (118). He told the master that he was on the bridge, but neither saw nor heard the Svea (118, 122). The master did not believe he stayed on the bridge, but thinks he had left it and was in the chart room (118, 119). Nor do we believe him, for it seems inconceivable to us that a licensed officer could have been on the bridge without seeing or hearing the Svea, or, having seen or heard her, could have taken no action when his was the burdened vessel and bound to keep out of the way. We therefore did not call him and have no quarrel with the

*See page 16 infra.

finding of the District Court that he was not on the bridge (65). The master's testimony that he thinks the mate must have been in the chart room seems reasonable in view of the testimony of the officers of the Svea (reviewed below) that they had the Newport under concentrated observation for eight miles and half an hour, and at no time saw anyone on her bridge and expressed concern to each other about it.

The fault of the Newport being admitted, the only question in the case (apart from that of Captain McKinnon's personal liability, which is dealt with in the briefs in Cause No. 173) is whether the Svea was at fault also. The Circuit Court of Appeals, after reviewing what was seen and noted from her bridge, found that it became distinctly apparent to her that the Newport was going to fail in her duty to keep out of the way, and that the Svea, though the privileged vessel, was to blame for standing on her right of way straight into the collision, instead of taking some affirmative action herself to avoid it. It therefore becomes important to inquire what transpired on the Svea's bridge, and what was seen and noted by her officers during the long approach to the collision.

The statement in the Svea's brief is meager. It omits features (such as failure to see anyone on the Newport's bridge) which seem to us very material in determining whether the Svea had distinct indication that the Newport was about to fail in her duty. We therefore venture to relate somewhat more fully

THE APPROACH TO COLLISION AS SEEN FROM THE SVEA.

The time of the collision was 9:53 in the morning of the day in question. Half an hour before (about 9:20) the master of the Svea sighted the Newport about three points on his port bow, approximately eight miles distant (182). At 9:30, the mate joined Captain Rohberg on the bridge and they discussed what vessel the Newport might be. She was then about six miles away on the same bearing (184, 151). The mate put his glasses on the Newport and finally concluded that it was one of the Pacific Mail boats. When the vessels were about three miles apart and the bearing had not changed, the mate said, "I wonder what he is going to do," and the captain remarked that the situation "didn't look very good" (184). They were naturally concerned about the unchanging bearing, for that meant risk of collision. The Svea proceeded until the vessels were something more than two miles apart, and still the Newport's bearing did not change. So the Svea gave a one-blast whistle to attract the Newport's attention (151, 185).* This was when the Newport was still over two miles distant (152, 184, 185). Under the circumstances the mate regarded this as "close to us, very close" (151), and was evidently apprehensive. They ex-

*The master of the Svea gave this one blast signal under the impression that it was the proper passing signal calling for a port to port passing (200). As a matter of fact, this is not a proper signal under the International Rules. The only signal proper for the holding-on vessel under the International Rules is a detonating signal to attract attention.

"Every vessel may, if necessary in order to attract attention, in addition to the lights which she is by these Rules required to carry, show a flare-up light or use any detonating signal that cannot be mistaken for a distress signal." (Art. 12, International Rules, 26 Stat. 325.) The signal given would have been proper under the Pilot Rules had the vessels been in inland waters, to signify that the privileged vessel was proposing to fulfil her primary duty to hold course and speed. (*Le Boyteaux, The Rules of the Road at Sea*, p. 178.)

pected an answer, but got none (152, 185), and, although the master of the Svea took particular pains to look, no steam came from her whistle (185). The Svea's one blast was supererogation. The holding-on vessel is not required under the International Rules to signal her intention of performing her primary duty of holding her course and speed.* Nevertheless, the Svea, having whistled her approach, naturally anticipated some signal or sign from the Newport that she was taking steps to get out of the way now that the margin between them was narrowing. Persistence on the present courses with unchanging bearings could only lead to collision. The move was the Newport's, as she was the burdened vessel. If she changed her helm or reversed her engines her duty was to signal the same, under Article 28 of the International Rules.** If she slackened speed or stopped her engines those steps would be manifested by alteration of bearings. There was none (198). Just before the one-blast signal was blown the mate again put his glasses on the Newport and made out her name (163, 185). But, though he scanned her bridge, apparently wondering why she did not answer the whistles, he "saw no activity on the bridge at all" (163).

The Svea proceeded with course and speed unaltered until the vessels were a mile apart, and then (as noted

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*See *The Haida*, 191 Fed. 623, at page 626.

**Article 28. The words "short blast" used in this article shall mean a blast of about one second's duration.

When vessels are in sight of one another, a steam-vessel under way, in taking any course authorized or required by these rules, shall indicate that course by the following signals or whistle or siren, namely:

One short blast to mean, "I am directing my course to starboard."

Two short blasts to mean, "I am directing my course to port."

Three short blasts to mean, "My engines are going at full speed astern." (26 Stat. 328.)

below) blew the danger signal. The mate of the Svea testifies as follows concerning this interval:

"Q. Between the time you blew the one whistle and the time you blew the first four-blast signal, did you have your glasses on her from time to time?

A. Not right along.

Q. Did you have your glasses on her from time to time during that interval? A. I don't remember if I did, or not, but I never saw anybody on the bridge.

Q. Did you look for anybody? A. Yes, I looked up there, and I passed the remark to the old man, 'I don't see anybody on the bridge.' I didn't know why they didn't answer the whistles.

Q. That was before you blew the first four blasts?

A. Yes.

Q. You never say (saw) anybody. A. No.

Q. And you didn't hear any signals? A. No.

Q. And she didn't seem to be changing at all?

A. Not to me.

Q. And her bearing seemed to be the same?

A. I didn't take no bearing of her, but her position looked to be the same.

Q. And you kept your course and speed?

A. Yes." (163-164.)

This was the situation until the vessels were a little over a mile apart. The combination of circumstances (non-response by signal or action to the one-blast signal; seemingly deserted bridge; constant three-point bearing, significantly pointing to collision unless one of the vessels did something) gave Captain Rohberg concern. He says that he thought something was wrong, and that he ought to give a danger signal, which he did—four short blasts (152, 164, 185, 201).

The International Rules, as we have already mentioned, do not provide for such a signal. The "detonating signal" (Article 12, 26 Stat. 325) should be used by a vessel

desiring to attract the attention of another. However, the four short blasts signal of the Inland Rules* which was used would serve to draw the Newport's attention to the Svea's presence and would elicit response by signal or alteration of bearing if the Newport did anything to avoid the threatening collision. The Svea's mate testified concerning this four-blast signal:

> "Q. How far away were you when you blew four whistles? A. Perhaps a mile off. He did not notice our first whistle, and we waited a while, and then we blew several small whistles, the captain did, so as to draw his attention. There was no answer to that, either.
>
> Q. The captain blew the whistles, did he?
>
> A. Yes.
>
> Q. After you blew the four short blasts, then what did you do? A. We waited a while, expecting him to take action; he was closing in on us and we blew four more when he was close in." (152.)

The Newport signaled nothing and did nothing in response to the danger signal (152, 185).

> "Q. And your idea in blowing the danger signal was to try and get somebody to do something over there? A. Yes, sir.
>
> Q. And you were not getting any signals from him? A. No."
>
> (Testimony of Captain of the Svea, 200.)

The vessels were coming closer and closer together, with the Newport's bearing remaining unchanged and no activity visible on her bridge (164, 200).

---

*Article 18, Rule III. If, when steam-vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam-whistle. (30 Stat. 100.)

The same combination of circumstances existed when the vessels had drawn to a little over three-eighths of a mile apart (186), about one-half mile according to counsel for the Svea (72), and Captain Rohberg blew a second danger signal of four blasts (186). Referring to this signal, the captain testified:

> "Q. What did you blow your distress signal for?
> A. To call his attention to me. It did not look good to me then, the way things looked." (199.)

Still no response either by signal or change of course or bearing on the part of the Newport, nor any observation of any sign of life on her bridge.

> "Q. And at no time did you see any activity on the bridge of the Newport?
> A. No, sir, I never did."
>
> (Testimony of mate of the Svea, 164.)

The two vessels churned their way without touching helm or engines* to inevitable intersection and collision.

THE QUESTION PRESENTED.

The Newport having admitted fault, the only question for decision, as we conceive it, is whether under the circumstances outlined above the Svea was justified in persisting in her course and speed to the point of collision instead of taking some affirmative action to avoid it.

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*Except for last moment helm and engine changes given in the footnotes on page 5, supra, which did not affect the situation.

SUMMARY OF ARGUMENT.

Briefly summarized, our argument is as follows:

The rule requiring the privileged vessel on crossing courses to hold her course and speed is not unqualified but is subject to the Note appended to that rule and to the General Prudential Rule and the Rule of Good Seamanship under which the privileged vessel must, in special circumstances, depart from her primary duty to avoid immediate danger. Under the decisions of this Court, such special circumstances arise and call for affirmative action by the privileged vessel to avoid immediate danger when she has distinct indication that the burdened vessel is about to fail in her duty. The Svea in this case received distinct indication—or, in the words of the Circuit Court of Appeals, it became "distinctly apparent"* to her—that the Newport was about to fail in her duty. Disregarding such distinct indication, the Svea persisted in her right of way to the point of collision, and is therefore in mutual fault with the Newport for its occurrence.

If this court finds that the Svea had such distinct indication, it will be unnecessary to go further; for she admittedly failed to act upon it. If, however, the finding of this court should be against distinct indication, we submit that the Svea should still be held at fault under the law as stated by this court, because the Svea could have acted and averted the collision after the Newport could not longer avoid her by porting. The chapters of the argument will accordingly be as follows:

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*The perverted construction which the Svea brief (p. 18) puts on "apparent" is considered later. See p. 37 infra.

OUTLINE OF ARGUMENT.

I.

The rule requiring the privileged vessel on crossing course to hold course and speed (Article 21) is not unqualified, but is subject to the provisions of the Note to Article 21, the General Prudential Rule (Article 27) and the Rule of Good Seamanship (Article 29), under which, *in special circumstances,* the privileged vessel must depart from her primary duty in order to avoid *immediate danger of collision.*

II.

Under the decisions of this court, a case of *special circumstances* arises and the privileged vessel must depart from her primary duty and take affirmative action to avert collision if she receive distinct indication that the giving-way vessel is about to fail in her duty.

III.

The Svea received such distinct indication but held to her right of way instead of taking affirmative action to avert the threatened collision, and was properly held at fault by the Circuit Court of Appeals.

1. In a collision occurring, as did this, on the open ocean, with perfect visibility, and nothing to obstruct navigation, there is a presumption of mutual fault, and the vessel (Svea) seeking to be excused must exonerate herself by the clearest evidence. Inapplicability to this case of the rule of presumption and burden of proof argued in the Svea brief (p. 30).

2. Apart from presumption, the Svea received distinct indication that the Newport was not going to give way.

3. The answer to the Svea's argument on "distinct indication" and her philological quibble.

4. Having received distinct indication, the Svea was at fault for not acting.

5. The time for action by the Svea was when there was room for her to act effectively so as to avert the threatened collision by her action alone.

If the court finds, as above submitted, that the Svea had distinct indication and was at fault for not acting thereon, it will be unnecessary to go further. If, however, the court finds otherwise, the next point will be that

IV.

Even in the absence of previous distinct indication that the burdened vessel is about to fail in her duty, the privileged vessel must depart from her primary duty of holding course and speed and herself act to avert collision if she can do so when the burdened vessel can no longer avoid her by porting. The Svea could have averted this collision by her own action, even after the Newport could no longer avoid her by porting.

1. The rule as declared by this court.

2. The Svea could have averted the collision after the time when the Newport could no longer avoid her by porting.

V.

The claim of the Svea that the Newport could have avoided her by porting until the vessels were only a ship-

length apart is without foundation in the record and such maneuver would be a physical impossibility.

VI.

The authorities relied upon by the Svea do not exonerate her.

ARGUMENT.

I.

THE RULE REQUIRING THE PRIVILEGED VESSEL ON CROSSING COURSES TO HOLD COURSE AND SPEED (ARTICLE 21) IS NOT UNQUALIFIED, BUT IS SUBJECT TO THE PROVISIONS OF THE NOTE TO ARTICLE 21, THE GENERAL PRUDENTIAL RULE (ARTICLE 27) AND THE RULE OF GOOD SEAMANSHIP (ARTICLE 29), UNDER WHICH, IN SPECIAL CIRCUMSTANCES, THE PRIVILEGED VESSEL MUST DEPART FROM HER PRIMARY DUTY IN ORDER TO AVOID IMMEDIATE DANGER OF COLLISION.

As this collision took place on the high seas, the International Rules (26 Stat. 320) apply. These rules are printed in convenient form in columns paralleling the Inland Rules in Department of Commerce Circular No. 230, dated June 8th, 1917, and entitled: "Rules to Prevent Collisions of Vessels." They are also given in convenient form in the Rules of the Road at Sea by W. H. La Boyteaux, New York, Baker, Voorhis & Co., 1920.

Preliminary Note to Steering and Sailing Rules.

26 Stat. 326:

Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of

an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist.

Article 19, 26 Stat. 327:

When two steam-vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.

Article 21, 26 Stat. 327:

Where, by any of these rules, one of two vessels is to keep out of the way, the other shall keep her course and speed.

*Note—when, in consequence of thick weather or other causes, such vessel finds herself so close that collision can not be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision. (See articles twenty-seven and twenty-nine.)

Article 22, 26 Stat. 327:

Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other.

Article 23, 26 Stat. 327:

Every steam-vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse.

The foregoing may be termed the primary rules of the road for steam vessels crossing so as to involve risk of

*The Note was added by amendment in 1894, 28 Stat. 83. See infra, p. 24.

collision. *Primary* because they are not absolute or unqualified, but, like the law before codification, recognize that the object after all is to prevent collision. The primary rules themselves must therefore give way when literal adherence to them would promote rather than avert collision. The "right of way" or "duty to hold on" is of course not a vested right (to which one has title or claim, on which he may legally insist) or an absolute duty (to which he *must* conform) though doing so may involve loss or disaster for others. Such disaster, the sacrifice of the lives and property of innocent persons as well as of the navigator, is the very thing that the right of way, or duty to hold on, like the other rules of navigation, is designed to avoid and when it appears that standing on a right of way or clinging regardless to a duty is going to defeat rather than promote that beneficent end the right of way must be surrendered—the duty departed from. No captain is entitled to imperil his and the other vessel and the persons aboard them in order to defend his right of way, or hold to a primary duty.

So we find the foregoing *primary* rules qualified by other rules. The note to Article 21 refers specifically to what are commonly called the General Prudential Rule or Rule of Special Circumstances:

Article 27, 26 Stat. 327:

> In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

and The Rule of Good Seamanship:

Article 29, 26 Stat. 328:

Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

These rules by their very terms, qualify all the other rules thus recognizing and enforcing the doctrine of this court that

> "every navigator ought to know that rules of navigation are ordained, not to promote collisions, but to save life and property by preventing such disasters".
>
> *The Sunnyside,* 91 U. S. 208, 222,
>
> quoted in
>
> *The New York,* 175 U. S. 187

that

> "* * * rules of Navigation are ordained to preserve life and property, and not to permit or authorize collision. Even flagrant fault committed by one of two vessels approaching each other from opposite directions, will not excuse the other from adopting every proper precaution to prevent a collision."
>
> *The America,* 92 U. S. 432, 438.

The lower Federal courts have repeatedly called attention to the qualification under special circumstances of the primary rules. The following are typical statements:

> "* * * no code of navigation gives leave to run into collision; the saving rule of special circumstances

flavors every other rule with the salt of caution and common sense."

La Lorraine, 12 F. (2nd) 436, 437 (2nd C. C. A.).

"The primary purpose of rules of navigation, as said by the Supreme Court, is not to fix arbitrary rights of the road to vessels, but rather for the safety of life and property."

The Admiral Watson, 266 Fed. 122.

"But over and underlying all the rules of navigation is that rule of common sense, so often referred to, that no one has the right to run into collision."

The George S. Tice, 287 Fed. 127 (2nd C. C. A.).

"Where property and life are at stake, neither party should insist upon persisting in a course which is likely to result in disaster, when the delay of a few moments will insure the safety of both."

The Senator Rice, 223 Fed. 524 (2nd C. C. A.).

"But the privileged vessel is to hold her course, constantly observing the burdened vessel in order to notice if the latter fails in her duty. When the failure of the burdened vessel becomes apparent, the privileged vessel must change her course, as prudence commands."

The Devonian, 110 Fed. 588.

"No privilege exempts a vessel from using ordinary common sense to escape from danger."

The Southern, 224 Fed. 210.

"As was held in the John H. Starin, 162 Fed. 146, 89 C. C. A. 170, there is no right of way on which a vessel is entitled to insist, when it is obvious that it will result in collision."

The Jason, 288 Fed. 57, 61.

"There is no such thing as a 'right of way' to run into unnecessary collision. The rules of navigation are for the purpose of avoiding collision; not to justify either vessel incurring a collision unnecessarily. The supreme duty is to keep out of collision."

The Non Pareille, 33 Fed. 524, 526.

"Whenever danger of collision has become manifest, and the vessel previously bound to avoid it is plainly neglecting her duty to do so, the circumstances are special, and the other vessel must do what she can to prevent disaster. If this rule were not acted on and rigidly enforced, disastrous collisions would arise daily, and the lives and property of innocent persons be sacrificed to a tenacious adherence to the mere right of way; * * *."

The Aurania and *The Republic,* 29 Fed. 98, 126, 127.

These qualifying rules are not printed among the other international rules "applicable" on page 10 of the Svea's brief, though quoting the Note to Article 21 necessarily involved a reference to them by number. Otherwise they are ignored throughout the Svea's brief.

As this court states in *The Sunnyside,* supra, even before the adoption by Congress of rules to prevent collision, it was a fundamental principle of collision law that no general rule of navigation granted a vessel the right (or, accepting the expression preferred by our opponents, imposed the duty) to run into collision; it having always been the law that, irrespective of rule or privilege, a vessel must adopt all such reasonable and necessary precautions to prevent collision as the circumstances in which she is placed give her the opportunity to employ.

Once codification began, the history of the Congressional enactments to prevent collisions at sea shows continuous recognition of "the saving rule of special circumstances." Congress first enacted rules of the road at sea in 1864, applicable both to collisions at sea and in inland waterways. These rules are in 13 Stat. 58 and Rev. Stat. Section 4233, et seq. This enactment contained the General Prudential Rule or Rule of Special Circumstances in practically the same language as it stands today. It appears in the 1864 enactment as rule 19 of 13 Stat. 58 and rule 24 of the Revised Statutes as follows:

> "In construing and obeying these rules, due regard must be had to all dangers of navigation, and to any special circumstances which may exist in any particular case rendering a departure from them necessary to avoid immediate danger."

The rules of 1864 similarly contained the substantial equivalent of the present Article 29 often called The Rule of Good Seamanship. This was Article 20 of 13 Stat. 58. It was never repealed but was not incorporated into the Revised Statutes—apparently, as this court states in *Jones v. Slauson,* 112 U. S. 514—by inadvertence. In the case just cited, this court says, however, that

> "Though thus not carried into the Revised Statutes, it will nevertheless be enforced as part of the general law of navigation."

It is to be noted that the rule in the enactment of 1864 requiring the privileged vessel to keep her course is by its terms tied directly into the General Prudential Rule or Rule of Special Circumstances. This is rule 18 of

13 Stat. 58 and 23 of Rev. Stat. Section 4233, et seq., and reads:

> "Where, by Rules seventeen, nineteen, twenty and twenty-two, one of two vessels shall keep out of the way, the other shall keep her course, *subject to the qualifications of Rule twenty-four.*" (Italics ours). (Rule twenty-four was the General Prudential Rule which we have quoted above.)

In 1885 Congress adopted the "Revised International Rules and Regulations for Preventing Collisions at Sea" (23 Stat. 438). These apply only to vessels at sea and not to inland waters, and contained in Articles 23 and 24 the present Articles 27 and 29: that is to say, the present General Prudential Rule or Rule of Special Circumstances and the present Rule of Good Seamanship. In this enactment of 1885 the privileged vessel rule does not refer as theretofore in its terms to the Special Circumstance Rule, but both the Special Circumstance and Good Seamanship Rules, then as now, by their own express terms, qualified all the other rules.

Thus, Article 23 of the Rules of 1885 (the present Article 27) reads:

> "Art. 23. *In obeying and construing these rules* due regard shall be had to all dangers of navigation, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger." (Italics ours),

and Article 24 of the Rules of 1885 (the present Article 29) reads:

> "Art. 24. *Nothing in these rules shall exonerate* any ship, or the owner, or master, or crew thereof,

from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case." (Italics ours.)

The present International Rules of the Road at Sea are those of 1890 and are set forth in 26 Stat. 320. They represent the adoption by Congress of the revision of the rules as made by the International Marine Conference held at Washington, D. C. in 1889. Like the Rules of 1885 they apply only to vessels on the high seas, not to inland waters. As originally adopted, Article 21 prescribing the duty of the privileged vessel to keep her course and speed, contained no specific reference to the General Prudential Rule or Rule of Special Circumstances (Article 27) and the Rule of Good Seamanship (Article 29). In 1894,* however, Congress adopted the Note to Article 21 which is now a part of it (see page 17, supra), and which specifically refers to, and ties Article 21 in with, Articles 27 and 29, that is to say, the General Prudential Rule, or Special Circumstances Rule and the Rule of Good Seamanship, respectively.

It is quite true, that under the Rules of 1864 and 1885, the privileged vessel was only required to hold her course (Article 18 of 13 Stat. 58; Rule 23 of Rev. Stats. Section 4233, et seq; Article 22 of 23 Stat. 438) whereas, under Article 21 of the present rule, the privileged vessel is to hold her course *and speed.*

*28 *Stat.* 83.

It is furthermore true, as Svea counsel state (Svea Brief, p. 9), that under the two previous enactments—those of 1864 and 1885—*every* steamship when approaching another vessel so as to involve risk of collision was required to slacken her speed or, if necessary, stop and reverse. (Article 16 of 13 Stat. 58; Rev. Stat. Section 4233, et seq. Rule 21; Article 18 of 23 Stat. 438;) whereas, in the present Rules of 1890 this is enjoined only on the *burdened* steam vessel by Article 23 as quoted in the earlier part of this chapter.

It seems to be the view of counsel for the Svea that this change in the rules means that the privileged vessel, even under special circumstances, may now hold her course and speed right into the jaws of collision, that is to say, until the vessels are actually *in extremis*. It was when approaching another vessel "so as to involve risk of collision" that every steam vessel was required under the old rules to slacken speed or, if necessary, stop or reverse. Mere *"risk of collision"* therefore does not justify the privileged vessel in departing from her course and speed under the present rules. But her duty to hold course and speed remain subject to the qualifying rules, so that she must still yield her primary right, or, as counsel for the Svea prefer to put it, depart from her primary duty, when that is necessary *"to avoid immediate danger."*

This is the express mandate of the rules themselves. It follows, also, from the decision of this court in *The Sunnyside*, 91 U. S. 208. We review this case at some length in the argument. It will suffice to say here for present purposes that in that opinion this court condemned a

sailing vessel for not departing from her primary obligation to hold her course when it was indicated to her that the burdened steam vessel was not going to keep out of the way. This court held that the case was one of special circumstances calling for action by the privileged vessel to avert the collision. While *The Sunnyside* was governed by the *Rules of 1864* the decision is exactly in point. For there, the privileged vessel was a sailing vessel and the obligation under the old rules to slacken speed or stop or reverse when there was risk of collision did not apply to *sailing* vessels, but was in terms restricted to *steam* vessels. A privileged *steam* vessel under the present Rules stands in precisely the same position as did the privileged *sailing* vessel in *The Sunnyside,* and the principle holds.

The New York, 175 U. S. 182, like *The Sunnyside,* arose under the Rules of 1864. Its importance in the *general* argument is considered later on. Its importance in the present connection is that like *The Sunnyside* it demonstrates (if demonstration be needed beyond the mandate of the rules themselves which we doubt) that, whether or not the privileged vessel be under the old rule to slacken speed or stop or reverse when approaching another vessel so *as to involve risk of collision,* she must take affirmative action under the Special Circumstances Rule *to avoid immediate danger.* The opinion after directing attention to the Rule of Special Circumstances and pronouncing that

> "* * * the fact that a steamer is entitled to hold her course does not excuse her * * * from adopting such precautions as may be necessary to prevent a

> collision, in case there be a distinct indication that the obligated steamer is about to fail in her duty"

goes on to state that

> "There is *another* rule pertinent in this connection" (Italics ours),

citing the rule that every steam vessel when approaching another ship so as to involve risk of collision shall slacken speed, or, if necessary, stop or reverse.

In other words the privileged vessel in *The New York* was condemned under the Special Circumstance Rule and *separately* under the other rule.

II.

UNDER THE DECISIONS OF THIS COURT, A CASE OF SPECIAL CIRCUMSTANCES ARISES AND THE PRIVILEGED VESSEL MUST DEPART FROM HER PRIMARY DUTY AND TAKE AFFIRMATIVE ACTION TO AVERT COLLISION IF SHE RECEIVE DISTINCT INDICATION THAT THE GIVING WAY VESSEL IS ABOUT TO FAIL IN HER DUTY.

There is no dispute concerning the principle of law to be applied to the case. Petitioners base their case on

> *The Delaware,* 161 U. S. 459,

which we accept. The negative statement in *The Delaware*:

> "that the preferred steamer will not be held in fault for maintaining her course and speed, so long as it is possible for the other to avoid her by porting; *at least in the absence of some distinct indication that she is about to fail in her duty.*" (Italics ours),

and the affirmative statement of the same rule in the later case of

The New York, 175 U. S. 182,

> "But the fact that a steamer is entitled to hold her course does not excuse her from inattention to signals, from answering where an answer is required, or from adopting such precautions as may be necessary to prevent a collision, in case there be a distinct indication that the obligated steamer is about to fail in her duty."*

and in the earlier case of

The Sunnyside, 91 U. S. 208,

> "Errors committed by one of two vessels approaching each other from opposite directions do not excuse the other from adopting every proper precaution required by the special circumstances of the case to prevent a collision; * * *
>
> "Cases arising in navigation where a stubborn adherence to a general rule is a culpable fault, for the reason that every navigator ought to know rules of navigation are ordained not to permit collisions but to save life and property by preventing such disasters,"

settle the law beyond question.**

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*Our opponents seek to accept the Delaware, and reject the New York upon the claim that the latter is governed by the old rules. As a matter of fact, both cases were under the old rules. But both are in point on the obligation of the privileged vessel to act *in special circumstances to avoid immediate danger.* As we have already pointed out (pp. 24-26, supra), the change in the rules relieving the privileged vessel from the duty of slackening speed or stopping or reversing when approaching another vessel so as to involve *risk of collision* does not relieve her of her obligation to act under the Special Circumstance Rule, etc., *to avoid immediate danger.*

**With the principle settled we are not burdening the body of the brief with extensive review of cases applying it to their infinitely varying facts. For convenience of reference, however, we are summarizing in Appendix A cases in which privileged vessels have been condemned for failing to take action to avert collision, and in Appendix B the cases which seem to be principally relied upon by petitioners.

The law being settled, the only question is one of application of this guiding principle to the particular facts of this case. We turn, therefore, now to the question whether a competent shipmaster standing on the bridge of the Svea during the long approach to this collision would, had he noted and observed what the Svea's master noted and observed, have had distinct indication that the Newport was not going to give way, and ultimately, of course, to the question whether it was the act of a competent shipmaster to hold the Svea's course and speed into the jaws of this collision without taking affirmative action to avert it. We take the liberty of emphasizing that the true enquiry is not how the master of the Svea *actually* appraised the situation but how he *should* have appraised it—seeing and noting what he did. All through the Svea brief the case is presented subjectively. We think it cannot be disputed that the test is objective rather than subjective. This was clearly recognized in

The New York, supra,

where the privileged vessel was held accountable, not for what she *actually* heard and saw but for what she *ought* to have seen and heard.

III.

THE SVEA RECEIVED DISTINCT INDICATION THAT THE NEWPORT WAS ABOUT TO FAIL IN HER DUTY, BUT NEVERTHELESS HELD COURSE AND SPEED INSTEAD OF TAKING AFFIRMATIVE ACTION TO AVERT THE THREATENED COLLISION, AND WAS PROPERLY HELD AT FAULT BY THE CIRCUIT COURT OF APPEALS.

1. In a collision occurring, as did this, on the open ocean, with perfect visibility, and nothing to obstruct navigation, there is a presumption of mutual fault, and the vessel (Svea) seeking to be excused, must exonerate herself by the clearest evidence. Inapplicability to this case of the rule of presumption and burden of proof argued in the Svea Brief (p. 30).

Where one vessel (the Newport) is clearly at fault, there are several general principles of collision law which might be urged as applicable. One, which has been urged by petitioner, is—

Where one vessel is guilty of clear fault which in itself is sufficient to account for the collision, the other vessel will not be found in fault by merely casting a doubt on the propriety of her navigation.

Svea's Brief, p. 30 citing

The City of New York, 147 U. S. 72, 85;

The Victory and *The Plymothian,* 168 U. S. 410, 423.

This principle has been applied in cases involving crossing courses where the privileged vessel has received no indication of the failure of the burdened vessel and is *suddenly* without warning placed in a situation of great and imminent danger.

The Binghamton, 271 Fed. 69 (2nd C. C. A.);

The Tasmania, 6 Asp. 517.

On the other hand, an equally well settled principle is—

Even flagrant fault on the part of one vessel will not excuse another from adopting every proper precaution to avert collision.

The Sunnyside, 91 U. S. 202;
The America, 92 U. S. 432, 438;
The New York, 175 U. S. 187.

But in the situation presented by this record we need not deal with generalities. The day was clear, the weather calm, the wind neglible, there were no other vessels in sight to complicate navigation, and the Svea had observed the Newport proceeding with unchanged bearing for some eight miles and had the open ocean, not a crowded harbor, in which to manoeuver. The courts have repeatedly stated that collisions of this character (when both vessels have had each other in view for a long time in broad daylight or clear night and manoeuvering is not hampered by other ships) seem impossible without the concurring negligence of both sets of navigators, that it is hardly possible that the stupidity or obstinacy of a single master can produce them and that both vessels will be deemed *prima facie* negligent and neither exonerated unless "upon the closest scrutiny of the navigation of each vessel it can be discovered that one of them was free from all culpable blame."*

Thus, in *The Tenadores,* 298 Fed. 740, the Circuit Court of Appeals for the Second Circuit, had before it the case of a collision between a burdened and privileged vessel on

Yang-Tsze Ins. Assn. v. Furness Withy & Co., 215 Fed. 859 (2nd C. C. A.)

crossing courses. The collision was on a clear day under conditions most favorable for navigation. After finding both vessels to blame in certain particulars, Judge Hough went on to say:

> "yet perhaps an equally satisfactory admiralty *rusticum judicium* is to summarily declare that at that place, and under the circumstances of wind, weather, tide, and traffic, and in the absence of any evidence of malice or intoxication, both sets of navigators are *prima facie* negligent, and both have failed to give any reasonable explanation of how they got into admitted disaster."

In *The Senator Rice,* 223 Fed. 524, Judge Coxe, in the same court, said with reference to a collision between vessels on crossing courses where the starboard hand rule applied:

> "That such a collision should have occurred in broad daylight at a time when there was nothing in the elements to interfere with navigation seems inexplicable. It is hardly possible that the stupidity or obstinacy of a single master could have produced such a result and we think the collision was due to their combined action. Where property and life are at stake, neither party should insist upon persisting in a course which is likely to result in disaster when the delay of a few moments will insure the safety of both."

In *The Coamo,* 280 Fed. 282, there was a collision at sea, on a calm, clear day, between a steamship and barge in a crossing tow where the steamship and tug were privileged and burdened vessels respectively under the Starboard Hand Rule. Judge Hough said:

> "It is not disputed, nor disputable, that a more inexcusable collision has rarely been presented to any

court. It occurred on a fair, clear day, in waters most familiar and then uncrowded, and between vessels which could without difficulty have seen each other for miles, and were (as to tug and steamer) full powered, fully manned, and in perfect repair. These are material facts in considering the probability of collision occurring without mutual fault."

In *Yang-Tsze Ins. Assn. v. Furness, Withy & Co.*, 215 Fed. 859, Judge Rogers said:

"The loss of property for which a recovery is sought was due to a collision on the high seas, in broad daylight and in clear weather, and with no other vessels about to embarrass or interfere with navigation. The two vessels involved were steamers, and therefore could be maneuvered more easily than any other kind of vessels. They were in plain sight of each other when miles apart. They nevertheless came into collision and with such force that one of them sank in a few hours, carrying down with her the entire cargo. It is difficult to see how it all happened unless both vessels were in fault and failed to exercise reasonable care.

Plain common sense constrains one to such a conclusion. To exonerate either of them under such conditions can be justified only if upon the closest scrutiny of the navigation of each vessel it can be discovered that one of them was free from all culpable blame."

In the very recent case of *The Comus*, 19 F. (2d) 774, Judge Manton said:

"Where on a clear night, two vessels see each other 6 or 7 miles apart, and then come into collision on the wide ocean, there is a heavy burden upon each of them to explain their navigation in an endeavor to exonerate themselves from fault."

In the Ninth Circuit, Judge Rudkin in the *West Hartland,* 2 F. (2d) 834, applied this same presumption.

The courts have sharply differentiated between cases such as the one at bar and those above cited, and cases involving crowded harbor navigation and sudden emergencies. It should be noted that Judge Hough, who in *The Binghamton* (which was a case of action in sudden emergency) said:

> "It is incumbent on her (burdened vessel) to prove affirmatively and conclusively the fault of the other vessel."

laid down the admiralty *rusticum judicium* in *The Tenadores,* supra, to which we have adverted, and also wrote the decision in *The Coamo,* supra.

Likewise in *The Tasmania,* supra (another case of sudden emergency), where the court held that great allowance should be made for the privileged vessel because suddenly placed in a situation of great danger, the court recognized that

> "If it had been daylight, so that the master of the Tasmania could have seen what the other vessel was, and how it was maneuvering, the obligation to act, might have been more imperative and immediate."

So, also, *David Wright Smith* in *The Law Relating to the Rules of the Road at Sea,* (Glasgow, James Brown & Son, "Nautical Press" 1910) points out (p. 169) that the rule to be applied differs according to whether there is sudden emergency or whether the burdened vessel has been observed for a long time to be persisting in her course.

"But where a vessel is placed in a sudden dilemma by the fault of another vessel, the course which a man adopts, if he has exercised his best judgment at the moment, need not be proved to have been the best thing possible. See the *Bywell Castle* case referred to in the case of *The City of Corinth v. The Tasmania,* on page 173. It must not be supposed, however, that the principle of the Bywell Castle case is ordinarily applicable to that of a holding-on vessel, forced to take action to avoid collision under Arts. 27 and 29 in consequence of failure on the part of the other vessel to keep out of the way. Where (as in the Nacoochee case, dealt with on page 176) a steamer suddenly looms up in fog at excessive speed and rams a sailing-vessel, it may be applicable in judging of the conduct of those on the latter vessel, and where (as in the *Tasmania* case, dealt with on page 172) one sailing-ship on a dark night suddenly and at close quarters alters her course, so as to present a different light to another sailing-ship which has the right of way, and thereby brings about imminent risk of collision, and in similar cases, it may be also applicable. But, where the giving-way vessel has been observed for some time prior to the collision, in clear weather, to be persisting in keeping her course, there is nothing sudden about the predicament in which the holding-on vessel is placed, and the principle of the Bywell Castle case can have no application."

Thus we think it fair to say that the rule of *The City of New York, The Binghamton* and *The Tasmania* is not applicable to the case at bar, but on the contrary there is a presumption that the Svea was in fault and a heavy burden placed upon her to exonerate herself for her failure to take affirmative action to avert the collision. For, as the cases have said, the negligent conduct of the Newport is not, under these circumstances, sufficient to account for the collision.

2. Apart from presumption, the Svea received distinct indication that the Newport was not going to give way.

Distinct indication is not positive assurance. In the nature of things the privileged vessel cannot ask to be guaranteed that the burdened vessel is about to fail in her duty before she moves herself. Difficult as the position may be for the master of the privileged vessel and though it unquestionably puts him on his mettle (as the English Admiralty Court finely phrases it in *The Nautik* case, infra) he must be satisfied to act on distinct indication. We submit that the Svea had such indication that the Newport was not going to yield.

We have reviewed the sequence of events leading up to the collision (pp. 8-12, supra). It seems difficult to conceive how more distinct indications could have come from a burdened vessel than those which came from the Newport. Her bearing throughout the entire thirty-three minutes that elapsed between the time she was sighted eight miles away and the time of the collision remained constant. During a goodly portion of this time the mate of the Svea, though scanning the bridge of the Newport through the glasses to see why the Svea's whistles were not answered, could see no one on the bridge and remarked upon that curious situation to the master. The master himself, when they got close enough to see with the naked eye, noted the same phenomenon. When the vessels were a full two miles apart both officers expressed apprehension. "It did not look very good" to Captain Rohberg (184), and the mate "wondered what he was going to do" (184). A one blast signal at two miles, a danger signal

at one mile and a second danger signal at three-eighths or half a mile were unacknowledged. If the Newport intended to give way, it was her duty to signal any change of course or reversal of engines by whistles (Article 28 quoted in footnote p. 9, supra), whereas slackening speed or stopping engines would have been manifested by change in bearing. Nowhere in the books have we found such a grouping of distinct indications that the burdened vessel was not going to give way. The combination of an apparently deserted bridge, three successively unacknowledged whistle signals, two of them danger blasts, and an unchanging course of a vessel whose unquestionable duty it was to give way, seem to us as powerful a grouping of indications that the burdened vessel was failing in her duty as one could put together.

3. The answer to the Svea's argument on "distinct indication" and her philological quibble.

Our opponents argue first that the Circuit Court of Appeals misstated the rule of the Delaware on distinct indication, secondly, that it did not find distinct indication, and, thirdly, that there was no distinct indication.

It is not easy to see how any one can fairly read the opinion of the Circuit Court of Appeals and seriously submit that it decided this case under the misapprehension that it was only necessary to find *some* indication that the giving way vessel was about to fail in her duty. It is true that in summarizing, without quoting, the rule of the Delaware, the opinion uses the words "some indication" instead of "some distinct indication". But the court was

not under any misapprehension about distinct indication being requisite. The opinion rests not on *some* indication but on an accumulation of persuasive indications which are reviewed and held to have made it "distinctly apparent" that the Newport intended to persist in her course. And the opinion refers to the testimony of experienced mariners that in their judgment the conduct of the Newport "clearly indicated" (244) that she did not intend to change her course.

Our opponents then proceed to state what the Circuit Court of Appeals meant by "distinctly apparent". We should hardly have supposed that this needed elucidation. Nothing surely is plainer than this, that when you say something became *distinctly apparent* to some one else, you mean that it became *evident* or *manifest* to him; that is to say that *apparent* is used in its primary meaning rather than its secondary meaning of *seeming* or *ostensible.* This case cannot turn on a philological quibble. It ought not to be necessary to go to dictionaries but, if one does resort to them, more light will be obtained by taking a definition, and the appropriate definition, than by selecting a part of a discussion on synonyms. In the Standard Dictionary, which our opponents use, definition number 1 of apparent is "clearly perceived or perceivable; easily understood; evident; as, his guilt is apparent." Definition number 2, is "easily seen or to be seen, open to view; visible; as, the beauty of the landscape became *apparent.*" Definition number 3 is "seeming; ostensible." It is the discussion under synonyms of apparent in this third sense that the Svea's brief gives us as the *definition* of

apparent. The Standard Dictionary also says that in connection with the preposition "apparent is used in the sense of evident", instancing "his guilt is apparent *in* every act *to* all observers." The language of the opinion of the Circuit Court of Appeals was that the conduct of the Newport made it "distinctly apparent," i. e., *evident* (of course *to* the Svea) that the Newport intended to persist in her course. You cannot say "made it distinctly *seeming* or *ostensible* to the Svea."

The Svea brief claims further that when the Circuit Court of Appeals says that the dereliction of the Newport became "distinctly apparent" to the Svea they meant that the Svea was *in doubt* about it. The Standard Dictionary however uses *doubtful* as an antonym rather than a synonym for *apparent*. In this connection our opponents refer to a passage in the opinion of the Circuit Court of Appeals in another case, the *West Hartland* (2 F. (2d) 834-836). This passage reads:

> "For some considerable time before the collision, the master of the West Hartland was in doubt as to the course the Governor intended to pursue, and under such circumstances it was his plain duty to solve that doubt in favor of safety by giving a danger signal or taking timely steps to avoid a collision before plunging his vessel into a position where a collision would be the natural, if not the necessary, consequence."

But the West Hartland was under the Inland Rules, Article XVIII, Rule 3 of which provides:

> "If, when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so

> in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam-whistle.'"

The citation by the Circuit Court of Appeals of the West Hartland in conjunction with this court's decision in *The Sunnyside* (91 U. S. 208), *The Delaware* (161 U. S. 469) and *The New York* (175 U. S. 187) followed by the statement that "the principle upon which the cases cited rest must control" (243) shows that the Circuit Court of Appeals was announcing no doctrine at variance with the rule of this court that the privileged vessel is to hold her course and speed unless and until she receives distinct indication that the burdened vessel is about to fail in her duty, when she herself must act to avoid immediate danger.

We therefore submit that the Circuit Court of Appeals accepted the requirement of distinct indication and found it.

That leaves for consideration the last feature of the Svea's argument that the finding was not correct. The fundamental fallacy both in the argument of petitioner and in the opinion of the district court seems to us to be in isolating and rejecting seriatim each indication as not sufficient in itself to constitute distinct indication instead of asking, as did the Circuit Court of Appeals, what was the cumulative effect of them all. Thus petitioners state (their brief, p. 20):

> "The Circuit Court of Appeals was in error in holding that the failure of the 'Newport' to answer the signals of the 'Svea' was the 'distinct indication' required by the Delaware rule."

They further state (their brief, p. 26):

> "The Circuit Court of Appeals was in error in holding that the failure of the 'Newport' to maneuver, immediately after the last signal from the 'Svea', was the 'distinct indication' required by the Delaware rule."

Both assertions misstate the holding of the Circuit Court of Appeals. The holding was:

> "The fact that the Newport failed to maneuver immediately after the last signal from the Svea, *when considered with the immediately antecedent facts and circumstances, as already outlined,* made it distinctly apparent, we think, that she intended to persist in her course and thus made the danger of collision manifest." (Italics ours.)

The "immediately antecedent facts and circumstances, as already outlined," are related in the preceding paragraph of the opinion (15 F. (2d) 343):

> "The mate of the Svea saw no one on the bridge of the Newport; the captain and the mate were concerned, for they knew that, if the courses were kept, collision was inevitable. When the ships were two miles apart, the situation 'did not look very good' to the captain of the Svea; a signal of one blast at two miles was not answered. A danger signal at one mile, and a second danger signal at three-eighths of a mile, were unanswered, and never any change in the course of the Newport."

Petitioners assert that failure of a burdened vessel to acknowledge whistle signals is not the "distinct indication" required by the Delaware rule and cite certain cases which hold that crossing signals by a burdened vessel are merely invitations to depart from the rules and are not *in themselves* distinct indication. It is of

course true that it will depend on the particular circumstances of each case whether crossing signals without more constitute distinct indication. There can be no doubt that in certain circumstances they do.

The Senator Rice, 223 Fed. 524 (2nd C. C. A.); appendix xviii, petitioners' brief, appendix xii;
The Tenadores, 298 Fed. 740 (2nd C. C. A.); appendix vii, petitioners' brief, appendix xiii.

The first case cited in the Svea's brief (p. 21) in support of the contention that crossing signals are not necessarily indication is *The New York,* as decided by the Circuit Court of Appeals for the 6th Circuit (86 Fed. 814). It is true that the Circuit Court of Appeals found that the holding on vessel had not received distinct indication, and exonerated her; but the case came to this Court on certiorari and it was here held that the holding on vessel *had* received distinct indication and the judgment was mutual fault (*The New York,* 175 U. S. 187).

Petitioners likewise assert that holding course by a burdened vessel is not distinct indication. Under certain circumstances this statement is also undoubtedly true. But under varying circumstances, especially where the burdened vessel has been observed for a long period of time to be persisting in her course, this fact alone has been held to be distinct indication rendering the privileged vessel at fault for not taking action to avert the collision.

The Sunnyside, 91 U. S. 208.

The steam tug William Goodnow was lying in Lake Huron three miles from shore near the head of the St.

Clair River. Her machinery was stopped, but she was drifting at from one to one and one-half miles per hour. She was showing proper lights. The bark Sunnyside was coming up the lake under a wholesail breeze and was making about nine miles an hour. The lookout of the bark saw the tug's lights when the vessels were about two miles apart and reported to the mate. The mate remarked that she was a steamer and appeared to be heading eastward, and added that he "guessed she would take care of herself." Apparently, neither he nor the lookout paid any further attention to the tug until the lookout sang out that the tug's light was close to the bow of the bark. It was then too late to do anything, and a collision occurred.

The applicable rules were those of 1864 (13 Stat. 58). Under Rule 18 the bark was required to keep her course and under Rule 15 the tug was required to keep out of the way. Although *The Sunnyside* arose under the old rules, it is, as has been submitted, direct authority for the instant case; for the privileged vessel was a sailing ship and hence under no obligation to slacken speed or stop or reverse when there was risk of collision. The situation of the bark was exactly that of a privileged steamer under the present rules.

The District Court held the vessels in mutual fault and the Circuit Court reversed, holding the tug solely at fault. This court reversed, holding that the bark should have taken steps to avert the collision. This court said:

> "Rules of navigation are adopted to save life and property; and they are required to be observed, and are enforced to accomplish the same beneficent end,

and not to promote collisions. Consequently, they have exceptions; and no party ought ever to be permitted to defend or excuse a plain error by invoking a general rule of navigation, when it is clear that the case falls within an admitted exception * * *

Where one of two vessels is required to keep out of the way, the other is required, as a correlative duty, to keep her course; but the act of Congress, following the usages of navigation, provides that that rule shall be subject to certain reasonable and necessary qualifications. Special circumstances may exist in particular cases, rendering a departure from the rule necessary in order to avoid immediate danger; and the act of Congress, among other things, expressly provides that nothing in the statutory rules shall exonerate any ship from the consequences of the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case. * * * Errors committed by one of two vessels approaching each other from opposite directions do not excuse the other from adopting every proper precaution required by the special circumstances of the case to prevent a collision; as the act of Congress provides, that, in obeying and construing the prescribed rules of navigation, due regard must be had to the special circumstances rendering a departure from them necessary in order to avoid immediate danger. 13 State. 61; *The Maria Martin,* 12 Wall. 47; *The Lucile,* 15 id. 679. * * *

Negligence more manifest, culpable or indefensible, in view of the circumstances, is seldom exhibited in controversies of this character; and the only excuse offered for it is, that the eighteenth sailing rule provides, that, where one of two ships is required to keep out of the way, the other shall keep her course; entirely overlooking the fact that the mandate of that rule is declared by the rule itself to be subject to the qualification, that, in

obeying and construing the rule, due regard must be had to all dangers of navigation and to any special circumstances which may exist in any particular case, rendering a departure from the rule necessary in order to avoid immediate danger.

Years before the act of Congress referred to was passed, this court promulgated the doctrine, that rules of navigation are adopted to prevent collisions, and to save life and property at sea, and not to promote such disasters; and decided that the neglect of one of two approaching vessels to show the signal lights required by law did not vary the obligations of the other to observe the rules of navigation, and to adopt all such reasonable and necessary precautions to prevent the collision as the circumstances in which she was placed gave her the opportunity to employ. *Steamship v. Rumball,* 21 How. 383; *Chamberlain v. Ward,* id. 568.

Reasonable doubt cannot, we think, be entertained, that Congress in enacting the sailing rules intended to promote the same objects by substantially the same requirements; for which there is abundant confirmation in Art. 20 of the sailing rules, which is as follows:

'Nothing in these rules shall exonerate any ship, or the owner, master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen or the special circumstances of the case.' 13 Stat. 61.

* * * * * * *

All admit that steamships engaged in navigation are to keep out of the way of sailing ships when the two are proceeding in such directions as to involve risk of collision; and that the sailing ship under such conditions is to keep her course, subject to the qualifications contained in Art. 19 of the sailing rules, and subject to the obligation applicable to all

ships under way, which is ordained in the twentieth article of the same rules, that nothing contained in those rules shall exonerate any ship from the consequences of the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case. * * *"

The court then discussed the possibility that perhaps the bark had not kept her course and said that this was not improbable; but said:

"* * * we prefer to rest the decision upon the ground that it was the duty of the bark, in view of the special circumstances, to have put up her helm and have gone to the right, or to have put it down and suffered the steam-tug to have drifted past in safety.

Cases arise in navigation where a stubborn adherence to a general rule is a culpable fault, for the reason that every navigator ought to know that rules of navigation are ordained, not to promote collisions, but to save life and property by preventing such disasters. In general, says Mr. Parsons, established rules and known usages should be carefully followed; for every vessel has a right to expect that every other vessel will regard them, but not where they will, from peculiar circumstances, certainly cause danger; as if a vessel, near a rock or shore, must strike it by putting her helm to port, which the general rule might require: and he adds, that 'no vessel is justified, by pertinacious adherence to a rule, for getting into collision with a ship which she might have avoided'; which is the exact case before the court. 1 Pars. Ship. and Ad. 580."

It will be noted that here the only indication of the failure of the tug was that she continued to drift along and took no steps to get out of the way. Yet this court

held that her failure should have been observed by the sailing vessel which should have taken affirmative action by change of helm to avoid collision.

Nautik v. Oostvoorne, 6 Lloyds List 110.

Petitioners state (brief, appendix xv), that this is not a case of crossing, but of overtaking vessels. They were originally overtaking but became crossing vessels as stated in the excerpt below.

The Nautik and the Oostvoorne were both approaching a pilot cutter off the entrance to the River Thames. The Nautik was privileged and the Oostvoorne burdened under the starboard hand crossing rule. The vessels sighted each other when two and one-half miles apart. The master of the Nautik stopped his engines to take off speed as he approached the cutter in order to take a pilot, but held her course. The Oostvoorne did not change course and a collision resulted. The Nautik reversed shortly before the collision. The court decided that the Nautik, which had observed the Oostvoorne approaching upon a dangerous course, should have taken affirmative action to avoid the collision before she did, and held her in mutual fault for the collision. The court said (page 112):

> "I have had the difficult task of considering whether the Nautik was also to blame. The events in question here took place in broad daylight, and these two Masters were in a position to see well what was going on. The Master of the Nautik was well aware of the rule with regard to crossing ships, and he decided to stand upon his rights. He acted, as I am advised, with good seamanship in his approach provided he took sufficient account of the

proximity and action of the Oostvoorne. But the Oostvoorne was proceeding upon a dangerous course during, at any rate, four or five minutes before the collision. During two or three minutes before the collision her course was a course of very considerable danger. It is said by the Master of the Nautik that he had no warning, that he had no signal of what was taking place, but he agrees that at a minute and a half before the collision he could have avoided it by helm action. He is doubtful about a minute before the collision and he thinks that at half a minute he could not have avoided it. He is wise in thinking that, because he took his helm action probably at half a minute and more before the collision.

I have anxiously considered the case of the Nautik, but I have come to the conclusion that the Master of the Nautik stood upon his rights to a dangerous extent. After all, if your right is to take a particular course at sea, and that course will inevitably produce collision, it is not yourself alone you are risking, it is other people's property and other people's lives. And there is in the regulations with regard to collision a regulation which requires people to exercise judgment when following the rules will result in collision.

I am not able to absolve the Master of the Nautik from blame. I think he was put upon his mettle by a course of action by which his rights were being encroached upon. That consideration does not absolve him from blame. I have come to the conclusion that the Nautik could within the period of danger—the period of a few minutes before the collision—have taken steps which might have avoided it, and I have come to that conclusion upon the advice of the Elder Brethren. They consider that as a matter of good seamanship he should have taken action. Standing on in the determined way in which he did invited disaster."

The advice of the Elder Brethren referred to in the last paragraph is significant in view of the fact that the master mariners examined as experts in the present case were all of opinion that as a matter of good seamanship the Svea should have acted and that standing on in the determined way she did invited disaster (McKinnon, 108 ff; Heygendorff, 127 ff; Warner, 133 ff; Winslow, 138 ff; Blanchfield, 142 ff.)

In

The Coamo, 280 Fed. 282 (2nd C. C. A.),

the privileged vessel had observed the burdened vessel approaching and failing to give way. When about 2700 feet from the point of collision the second officer of the Coamo, who was on watch, lost his head, hard-starboarded and a collision resulted. Judge Hough held the privileged vessel in fault for not sooner realizing the danger and when it was realized, for doing exactly the wrong thing. The privileged vessel sought to be exonerated on the ground that she was *in extremis* when she acted. As to this, the court said:

> "there was no excuse in permitting the situation to become in extremis."

See also

The Jason, 288 Fed. 57;
The George S. Tice, 287 Fed. 127 (2nd C. C. A.);
The Devonian, 110 Fed. 588.

Under the above authorities it would seem that the mere fact that the Svea observed the Newport persisting in her course for eight miles and thirty-three minutes

would *in itself* constitute distinct indication. And when we consider the additional cumulative indications which were received, we do not see how there can be any doubt about it.

Petitioners have only partially stated the facts which should have given the Svea distinct indication. They have omitted all reference to the fact that both the master and mate of the Svea noted that during the long advance there was apparently no one on the bridge of the Newport and that this phenomenon was the subject of much concern.

But entirely apart from any consideration whether either failure to acknowledge whistle signals, persistence in course, or apparently deserted bridge standing alone constitutes distinct indication, we submit that petitioners' approach is unsound and that these various indications cannot be isolated.

We repeat that the fallacy in the Svea's argument, and, we respectfully submit, in the opinion of the District Court, consists in taking up separately each successive incident during the long approach of the two vessels and rejecting it as not necessarily of itself constituting distinct indication that the Newport was not going to yield.* The sounder method, we suggest, is that which was fol-

*The District Court was, no doubt, led in part to excuse the Svea by its clearly erroneous finding that when the second danger signal was blown the vessels were only about 200 feet apart (66). It is true that the mate of the Svea testified that at this time the Newport was only about a ship-length off (152) and in another place from 200 to 300 feet away (164); but this opinion cannot stand against the positive evidence of the master of the Svea that at this time the distance between the vessels was three-eighths to half a mile (186, 203), which counsel for the Svea themselves accept (72, petitioners' brief, p. 4).

lowed by the Circuit Court of Appeals which appraised this moving panorama as a whole instead of incident by incident, thus viewing *all* the occurrences as merging into one picture of what was seen and noted from the bridge of the Svea. The Circuit Court of Appeals found in effect that each indication as it was received was consistent with and confirmatory of the previous indications and that the cumulative effect of them all considered as a whole made it "distinctly apparent" that the Newport was not going to give way.

4. Having received distinct indication, the Svea was at fault for not acting.

Where the circumstances are such that the conduct of the burdened vessel would not distinctly indicate to a master of reasonable skill and prudence that she was not going to give way, the privileged vessel need take no action so long as the other vessel can avoid her by porting. But where the previous indications *are* distinct, we do not see how, in the light of the authorities, there can be any uncertainty as to the duty of the master of the privileged vessel to take affirmative action by stopping, reversing or altering helm, according as the one course or the other commends itself to his best judgment in the particular circumstances. The decision what he should do and precisely when is, we think it must be conceded, often a difficult and, as some of the cases say, painful one for him to have to make. But we conceive (and the authorities we think are quite clear about this), that if he exercises his judgment in this regard reason-

ably and the burdened vessel which has put him to the necessity of the decision acts concurrently and thereby brings on the collision, the privileged master will not be condemned. The one thing for which he will and must be condemned is refusal to act at all. That he must not do. In other words he cannot escape the duty of acting by refusing to act. Otherwise of course the safe line, so far as liability is concerned, for the privileged master always to take would be to keep his course and speed, regardless, to the end. Then the qualifying rules of special circumstances and the authorities saying that, where there is distinct indication that the burdened vessel is failing the master of the privileged vessel must act, would be nullified. To construe the decision to hold course and speed under such circumstances as reasonable exercise of judgment to avert the collision would be to abrogate altogether the requirement that the privileged vessel must depart from the rule when she has distinct indication that the burdened vessel is not going to keep out of the way.

Yet this is precisely the plea of the master of the Svea in this case. His answer to questions what he did at each successive stage is the recurring refrain "I held my course and speed." His reason for so holding course and speed was that he "had the right of way." His own counsel interrogated him as to why he decided to keep on after no attention was paid to his second danger signal.

> "Q. Why did you decide to go ahead?
> A. Because I had the right of way." (213.)

While Svea counsel think primarily of the hold on vessel's *duty*, one has only to read the testimony of the

master of the Svea to see that *he* was thinking chiefly of his *right*.

He claims that he did not realize that the Newport was not going to yield until she was only a shiplength off (203). The question however is whether a competent shipmaster would have realized—had "distinct indication"—far sooner that the Newport was not going to yield and would have diverted his ship to avoid the collision instead of holding course and speed into it.

For as has been said before, the test is objective. This court emphasized this in *The New York* where it held her officers responsible for the lights and whistles they should have seen and heard regardless of actual seeing and hearing. And Lord Herschell forcibly states the objective standard in

City of Corinth v. Tasmania, 15 A. C. 223,

as follows:

> "Although, having regard to the relative position of the two vessels, it was the duty of the Tasmania to keep her course, it is clear that she would not be justified in blindly persisting in that course if it were manifest that disaster must result from it. It is provided by Rule 23 (Art. 27 of present Regulations) that, in obeying and construing the rules, due regard shall be had to any special circumstances which may render a departure from them necessary in order to avoid immediate danger. *As soon then as it was or ought to a master of reasonable skill and prudence to have been, obvious that to keep his course would involve immediate danger, it was no longer the duty of the master of the Tasmania to adhere to the 22nd Rule. He was not only justified in departing from it, but bound to do so, and to exercise his best judgment to avoid the danger which threatened.*" (Italics ours.)

It is true that the master of the privileged vessel in this case of *The Corinth* and *The Tasmania* was exonerated for failure to act sooner than he did but on the ground that the gross negligence of the other vessel had placed him *suddenly* in a difficult position—a ground of exoneration which the master of the Svea cannot plead.

The master of the Svea attempts to justify his failure to act at all with the plea that if he had done something in an effort to avert the threatening collision, the Newport despite all indications to the contrary, might at the eleventh hour have come to life herself and "If I acted, and if he acted, there would be a collision sure" (214). But that defense, as we have pointed out, could be offered by a privileged vessel in every case and the decision of the master of the Svea that "If I acted there would be some mistake, and so I came to the conclusion to keep my course and speed" (214) would simply be an abrogation of the rule that a privileged vessel must act to avert collision when the distinct indications are that the burdened vessel is going to fail in her duty. The fear of the master of the Svea that he might be blamed in the contingency contemplated by him is groundless. The authorities are quite clear that if the privileged vessel acts reasonably in the exercise of her best judgment and departs from course and speed when she has received distinct indication that the burdened vessel is not going to yield and then the burdened vessel suddenly changes and collision ensues, the privileged vessel will be excused.

The Zampa, 113 Fed. 541 (N. D. Cal.)

The ship Reliance was sailing close hauled on the starboard tack at night in the Pacific when she saw the red

light of the schooner Zampa off her port bow at a distance of a mile and a half. The Zampa soon showed both lights and thereafter her green light only. When the Zampa was quite close and almost directly ahead still showing her green light, the officer in command of the Reliance, believing a collision otherwise inevitable, changed his course to port. Immediately afterward the Zampa changed her course to starboard and a collision resulted. The Reliance was the privileged vessel and under the rule was required to hold her course and speed. It was held that under the circumstances the Reliance was justified in changing her course when she did, and that the Zampa was solely at fault.

The court said (page 543):

> "The question here is whether, at the time the Reliance changed her course, the officer in command was justified in believing that the Zampa was about to fail in her duty to keep off, and that there was immediate danger of collision, unless her course was changed. She had a right to depart from her course if necessary in order to avoid immediate danger, and, having this right, it must follow that, if the officer in command exercised a reasonable judgment in view of all the conditions then present, the action taken by him in changing the course of the Reliance cannot be attributed to her as a fault."
>
> *The Charles A. Campbell,* 142 Fed. 996.

In this case the schooners the Whiton and Campbell collided off the coast of Cape Cod. The vessels were on nearly opposite courses and saw each other several miles away. The Campbell was the privileged vessel and the Whiton the burdened one. The Whiton continued to approach and to bear more nearly ahead, all the time show-

ing her red light only until the red light was almost directly ahead and the Whiton only a few lengths away, so near that collision was unavoidable unless something was done. The privileged vessel changed course shortly before the collision and the burdened vessel thereafter. A collision resulted. The Campbell was held not in fault for changing course, and the Whiton held solely in fault for failing to keep out of the Campbell's way.

The court said (page 1001):

> "The Campbell did not hold her course until the vessels came together, and it remains to consider whether her failure to do so was a fault contributing to the collision. Under the circumstances as I find them to have been, I do not think it can be so considered. From the time the Whiton had first been seen a change of course on her part tending to keep her out of the Campbell's way had been expected by those on the Campbell. Such a change they had a right to expect, but instead of it they saw the Whiton keep on into a situation which became more dangerous as the vessels got closer. The longer she continued to do so, the more strongly did her management indicate that the persons navigating her were not aware of the danger and could not be relied on to do what was required of them in avoiding it. Under such circumstances, change of course on the part of the vessel not having the duty of keeping clear, is not always fault on her part. If made to avoid a collision which in the best judgment of a competent navigator then seems otherwise unavoidable, it is held not to be fault. The City of Augusta, 80 Fed. 297, 25 C. C. A. 430; The Zampa (D. C.), 113 Fed. 541; The Queen Elizabeth, 122 Fed. 406, 59 C. C. A. 345. The competence of the Campbell's master is established by many years' experience in commanding similar vessels. The careful observation of the Whiton during her approach and

the avoidance of any change of course on the Campbell's part until the red light was close under her bow, are, in my judgment, sufficient to show that the order to luff was such an exercise of his best judgment as should prevent its being regarded as a fault."

The Queen Elizabeth, 122 Fed. 406 (2nd C. C. A.).

Here a privileged vessel was held not chargeable with contributory fault for a collision with a crossing steamer in the night because of her change of course where such change was not made until immediately before the collision when the vessels were within a few hundred feet of each other, and when it became apparent that the schooner was attempting to cross ahead in violation of the rules. The lower court had held the privileged vessel at fault. The appellate court said (page 408):

"In this finding we are unable to concur. Unquestionably the failure of the ship to keep her course was a violation of the strict letter of Article 21, but we think that the omission to observe the rule was justifiable under the qualifying language of Article 27 and that, if it were an error, it was made in extremis. Article 27 provides that in obeying and considering the steering and sailing rules 'due regard shall be had to all dangers of navigation and collision and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.' In other words, a vessel should not adhere obstinately to the rules when disaster can be avoided by a departure from them. As was said in The Elizabeth Jones, 112 U. S. 514, 524; 5 Sup. Ct. 468, 473; 28 L. Ed. 812.

'There is no idea appertaining to keeping a course which justifies holding to it in such a way as to bring on a peril. The only principle inherent in it is to so act as to enable the other vessel, on whom the

duty rests, to adopt with success means of getting out of the way.' "

The Shawmut, 261 Fed. 616.

Here there was a collision between the schooner T. Morris Perot and the steamer Shawmut. The Shawmut was the burdened vessel and failed to get out of the way. Just prior to the collision the schooner starboarded her helm in an attempt to avoid the contact. It was held that the schooner was not in fault, the court saying (page 622):

"There is no doubt that the steamer ported her helm, and it may be (although this finding we cannot make) that she would have cleared the schooner if the latter had held her course, and it may further be that the schooner used bad judgment in putting her helm to starboard. The judgment exercised, however, was under the evidence a hasty judgment, forced upon the schooner by the steamer, and although bad judgment, or even a mistake in judgment, may be evidence justifying a finding of negligence, it will not justify such finding when it is excused by an emergency created by the negligence of the one who makes the complaint of bad judgment.

We are influenced in reaching the conclusion we have reached by the fact that the steamer should have made out the schooner in ample time to have moved outside of what we have called the zone of collision, and did see the schooner, as is admitted, in time to keep out of her way. The collision nevertheless occurred, and the steamer can escape a finding of culpability only by the facts, making it clear that the collision occurred through some cause other than failure in her duty to give the schooner sea room.

In every one of the long line of cases to which we have been referred by the proctor for the steamer in

his clear and very helpful discussion of this case, it will be found that the sailing vessel, held responsible for collision with a steamer, had changed her course, not because of necessity, born of some danger of navigation, or of some emergency decision forced upon her by the negligence of the steamer, but because she unexpectedly changed her course wholly for her own convenience, or to get some benefit or advantage which might have been deferred until the danger of collision was past."

The Montauk, 180 Fed. 697 (2nd C. C. A.).

Here the ferryboat Montauk on her way across the East River to a Brooklyn slip came into collision with transfer tug 18 which was coming up with a car float on each side. The Montauk three times blew signals of two whistles which were not answered. The tug kept her course until immediately before collision when she changed slightly to port and the Montauk held her course. Before collision both vessels reversed full speed astern. It was held that the Montauk was solely at fault for not keeping out of the way of the tug. The change of course of the tug was excused, the court saying:

"The only fault which could be imputed in our opinion to the transfer was her failure to hold her course and speed as required by article 21 of the Inland Rules. But her failure to do this, if not justified under article 27 to avoid immediate danger in the special circumstances of the case, was not a fault, but an error in extremis, when the collision owing to the gross fault of the Montauk was imminent."

5. The time for action by the Svea was when there was room for her to act effectively so as to avert the threatened collision by her action alone.

It being unquestioned law that no general rule of the road gives a vessel the right to run into collision, but that "the saving rule of special circumstances flavors every other rule with the salt of caution and common sense" (*La Lorraine,* 12 F. (2d) 436, 437), the question naturally suggests itself—when should the Svea have taken action?

It must be taken as settled that where the privileged vessel receives no distinct indication of the dereliction of the burdened vessel she is justified in maintaining course and speed so long as the burdened vessel can avoid her by porting.

The Delaware, 161 U. S. 459.

See also

The Binghamton, 271 Fed. 68.

But where the privileged vessel *does* receive distinct indication that the burdened vessel is not going to give way we submit that the true rule is that she must take action at a time when she can save the day *by her own action alone.* For otherwise, it seems to us, the beneficial results sought to be gained by having her take action will be vitiated. Her duty to take action is predicated upon the *distinct indication* that the burdened vessel will not do so; and if she is allowed to go past the point where she can avert catastrophe unaided and the burdened vessel acts as she *indicates* she will, it is then too late. There is immediate danger of collision within the rule of special circumstances when she has had distinct indication and

reached that point. Hence, we submit that the Svea, having received distinct indication that the Newport was not going to give way is at fault for not taking action at a time when she could have avoided the collision. It is submitted that the cases bear this out.

The Sunnyside, 91 U. S. 208;
The New York, 175 U. S. 287;
The Coamo, 280 Fed. 282 (2nd C. C. A.);
The Jason, 288 Fed. 57;
Nautik v. Oostvoorne, 6 Lloyds List 110.

If it be asked what the Svea should have done to avoid the collision, the answer lies in the mouth of Captain Rohberg, the master of the Svea. He testified that after he blew his third signal (the second danger signal) he could have avoided the Newport by either starboarding or reversing his engines (203, 205). By that time he had received the cumulative indications to which we have adverted that should have had the force of a positive radio message reading "the Newport is not going to give way".

Should this court sustain the finding of the Circuit Court of Appeals that the Svea had distinct indication of the Newport's dereliction in time to act herself, that will, it is submitted, be an end of the case; for the Svea did not act; and the point of our next chapter will be superfluous. If, however, this court should come to the conclusion that the events recited did not constitute distinct indication to the Svea that the Newport was not going to yield, we respectfully submit that, nevertheless, the judgment of mutual fault should stand. For

IV.

EVEN IN THE ABSENCE OF PREVIOUS DISTINCT INDICATION THAT THE BURDENED VESSEL IS ABOUT TO FAIL IN HER DUTY, THE PRIVILEGED VESSEL MUST DEPART FROM HER PRIMARY DUTY OF HOLDING COURSE AND SPEED AND HERSELF ACT TO AVERT COLLISION IF SHE CAN DO SO AFTER THE BURDENED VESSEL CAN NO LONGER AVOID HER BY PORTING. THE SVEA COULD HAVE AVERTED THIS COLLISION BY HER OWN ACTION, EVEN AFTER THE NEWPORT COULD NO LONGER AVOID HER BY PORTING.

1. The rule as declared by this court.

As has been previously stated, this court declared in *The Delaware*, 161 U. S. 459, on the basis of its previous decisions that the law was settled

> "* * * that the preferred steamer will not be held in fault for maintaining her course and speed, so long as it is possible for the other to avoid her by porting; at least in the absence of some distinct indication that she is about to fail in her duty."

The latter part of this statement of the law has been dealt with and, as we have suggested, we think disposes of the case. But, even if it should be found that the Svea did not have previous distinct indication of the Newport's dereliction, the Svea should still, we submit, be held to blame under the former part of this statement of the law.

2. The Svea could have averted the collision after the time when the Newport could no longer avoid her by porting.

The Newport and the Svea were normal ships as concerns maneuvering. Captain Rohberg said the Svea

"would turn fairly good" (194). Captain McKinnon said the Newport was "a handy ship to handle." (124)

The Svea was almost exactly one-half the length of the Newport. She was 174 feet long (179) and the Newport 337 feet long (107). The Svea was also slower than the Newport (107, 181). It cannot be disputed that under normal conditions the shorter the vessel and the slower the speed, the shorter is her turning radius.

Knight—Modern Seamanship, 8th ed., p. 326 ff.

This fact has been judicially recognized.

The Coamo, 280 Fed. 282, 285 (2nd C. C. A.):

> "It is a matter of record in reported cases (The Lepanto (D. C.), 21 Fed. 651; The Aurania (D. C.), 29 Fed. 98, 121, and especially The Normandie (D. C.), 43 Fed. 151, 159), and in published works of approved authority (Knight's Modern Seamanship, p. 195), how, with what speed, and with what radius of turning, vessels both smaller and larger than the Coamo will act under a hard over wheel. Within limits, the shorter the ship and slower the speed, the shorter the turning radius;"

The Svea being only about one-half the length of the Newport and of slower speed it follows that for some appreciable time after the Newport was powerless to avoid her by porting, the Svea could still have saved the day by prompt action. She did nothing. Hence, she would be at fault had she received no previous distinct indication that the Newport was not going to give way.

V.

THE CLAIM OF THE SVEA THAT THE NEWPORT COULD HAVE AVOIDED HER BY PORTING UNTIL THE VESSELS WERE ONLY A SHIP-LENGTH APART IS WITHOUT FOUNDATION IN THE RECORD AND SUCH MANEUVER WOULD BE A PHYSICAL IMPOSSIBILITY.

Petitioners repeatedly assert (Svea's brief, 4, 9, 29) that the Newport could have avoided the Svea by porting until the vessels were a ship length apart and cite the testimony of Captain McKinnon to substantiate the assertion (Svea's brief, 4, 29).

In the first place, this would be a physical impossibility for any vessel (see Knight, *op. cit.*). In the second place, Captain McKinnon testified to nothing of the kind. Captain McKinnon's testimony was that if the wheel were put over the vessel would start to *turn* within a shiplength (124). This cannot possibly be construed to mean that she could *avoid* the Svea in a shiplength.

No doubt the vessel would start to *swing* within a shiplength, i. e., feel her helm. But it is a matter of general knowledge, that when the helm of a vessel is put hard over, the whole mass of the ship, except the extreme bow, is thrown to the side *opposite* from that toward which it is desired to gain ground. The stern sweeps out a circle considerably larger than that traced by the bow and does not clear the line of the original course until it has traveled several shiplengths.

Knight—op. cit.

We submit that petitioners' statement that the Newport could have avoided the Svea by porting until the vessels were a shiplength apart is unfounded.

VI.

THE AUTHORITIES RELIED ON BY PETITIONERS DO NOT EXONERATE THE SVEA.

We have previously suggested (supra, p. 28), that in collisions of this character, the question of whether the "special circumstance" rule is applicable must of necessity depend upon the peculiar facts of each particular case. Except as a general principle is laid down no case may properly be said to be a precedent for any other. We submit that the authorities relied on by petitioner are in harmony with the views sought to be expressed in this brief, while their facts are easily distinguishable from those presented in the case at bar. All of these cases recognize that it is the duty of the privileged vessel to act when she has indication that the burdened vessel is about to fail in her duty.

For these reasons we feel, as we have stated in an earlier part of the brief, that no useful purpose would be served by lengthening the body proper of this brief through an extensive review of cases and accordingly deal in Appendix B with the cases which seem to be principally relied upon by petitioner—with the exception, however, of *The Delaware*, 161 U. S. 459.

With the Delaware we deal here because petitioners rest their case primarily upon it and, comparing it with the case at bar, assert that "it would be difficult to find a more analogous condition of facts." (Svea's brief, p. 33.)

The *law* as stated in the Delaware is accepted by both parties to this controversy. But we cannot agree that

on facts The Delaware is analogous to this *Newport-Svea* case. On the contrary they sharply and emphatically differ in the very connections that are the foundation of the controversy, namely, whether the master of the privileged vessel did or did not have distinct indication that the burdened vessel was derelict.

Reference to the map entrance to the Port of New York (given in the report of the case in the National Reporter System, 16 S. Ct. 518) will be helpful in connection with the description of the collision:

The collision was between the Delaware and an ocean tug called the Talisman towing a pilot boat. It occurred in Gedney Channel, a dredged entrance to the harbor of New York. The northern line of this channel was marked by a series of red buoys and the southern line by a series of black buoys. The Delaware was about to come into New York harbor through this channel. The Talisman was proceeding diagonally from the inner end of the channel toward the pilot station which was near the black fairway buoy at the southerly outward or ocean entrance of the channel.

The weather was cloudy and overcast with rain squalls following, so that the vessels, after sighting each other originally, were shut out from view of one another again until four or five minutes before the collision, when they were probably a mile or more apart. Then they sighted each other once more and were in view of one another until collision occurred.

At this juncture the Delaware made the outer red buoy marking the northerly line of the entrance to Gedney

Channel about a point on her port bow and starboarded one point to bring the buoy on her starboard bow. With the Talisman diagonally crossing the channel as above stated, the vessels were on crossing courses at about right angles to each other. The Delaware had the Talisman on her starboard hand. Therefore, the Delaware was burdened and the Talisman was privileged under the starboard hand rule.

> "The Delaware made no effort to avoid the tug. Instead of porting as she entered the channel, and passing up the starboard side and astern of the Talisman, the pilot kept her on her course until about a minute before the collision, when the master, who had been below, ran hurriedly on the bridge, and seeing the Talisman about three points on his starboard bow, and close at hand, ordered the helm hard a-starboard, and the engine stopped; though both orders were given too late to be of any service."

The Delaware struck the Talisman on her port quarter and she was a total loss. The Delaware was grossly at fault and no claim was made to the contrary. The question was whether the Talisman was also at fault. The main fault charged was that she should, though the privileged vessel, have taken steps herself to avert the collision. After reviewing various diverging views the court announced that, in view of its previous decisions, the law must be taken as settled,

> " * * * that the preferred steamer will not be held in fault for maintaining her course and speed, so long as it is possible for the other to avoid her by porting, at least in the absence of some distinct indication that she is about to fail in her duty."

The court thus recognizes that there would have been a duty on the part of the Talisman to take action had she had distinct indication that the Delaware was about to fail in her duty, but said:

> "In the case under consideration there was really nothing to apprise the tug that the Delaware would not port and go under her stern, until the collision became inevitable. The vessels were in plain sight of each other. The Delaware was entering a channel, whose course was marked by buoys, and she could not possibly have continued her then course without soon crossing the line of black buoys, which marked the southerly edge of the channel. There was every reason to suppose that, as soon as she passed the line of red buoys at the northerly edge, she would port and take her proper course up the channel * * *."

The Talisman had twice blown single whistle blasts indicating that she intended to hold her course. Neither of these signals had been acknowledged by the Delaware.

With regard to the contention made that the failure of the Delaware to acknowledge the signals of the Talisman should have apprised the Talisman that the Delaware was about to fail in her duty, the court said:

> "It is true the Delaware did not answer the signals of the Talisman as she should have done, but Captain Winnett, who was in charge, testifies that he was under the impression that she answered the first whistle, and made an allegation to that effect in his libel. He appears to have been mistaken in this, but as the morning was somewhat thick he might have thought so, and was not in fault for acting upon that hypothesis."

The second whistle was held to have been given when the vessels were *in extremis* but, even as to it, "three of

the libelant's witnesses from the Talisman seemed to have understood that it was answered."

This case expressly recognizes distinct indication of failure by the burdened vessel as calling for action by the privileged vessel, but under the facts of the case (the customary channel course and the justifiable belief that whistle signals were answered) could hardly find other than non-indication. The facts are not truly comparable with those of the case at bar, with its combination of cumulative and persuasive indications heretofore reviewed.

We respectfully submit that the judgment of mutual fault should be affirmed; with costs to respondents in this court and in both courts below.

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(APPENDIX FOLLOWS)

Appendix "A"

CASES IN WHICH THE HOLDING-ON VESSEL HAS BEEN HELD IN FAULT FOR FAILURE TO TAKE TIMELY ACTION TO AVERT COLLISION.

The New York, 175 U. S. 182.

This was a case of collision between two steamers, the Conemaugh and the New York. It took place on the Detroit River. The Conemaugh was coming down the river, the New York up. Both were a little to the American side of the midline of the river. Between them was a tug with a line of barges crossing from the Canadian to the American side of the river. The barges were tailing out behind, and, with the tug, occupied two-thirds to three-fourths of the navigable channel, leaving only some 500 to 800 feet between the rearmost barge and the Canadian bank.

Both the Conemaugh and the New York signalled the Burlington that they would pass astern of her barges, that is to say, between the last of them and the Canadian bank, and the two steamers accordingly directed their courses toward the Canadian bank.

This put them on crossing courses, the Conemaugh having the New York on her starboard hand. Thus the Conemaugh was the giving-way and the New York the holding-on vessel.

Having signalled the Burlington that she would pass astern of her barges, the Conemaugh hard-a-starboarded, and then, as she picked up the rear barge, steadied and ported to follow the tow. At this juncture she discerned

the white and red lights of the New York coming up the river, and, as we have said, apparently a little on the American side of mid-channel. Three times successively the Conemaugh gave the New York two blasts, indicating that she would pass between the New York and the Canadian side, which meant crossing the New York's bow. None of these signals were answered by the New York. The New York, for her part, was also heading toward the Canadian shore. Thus both vessels were pointing toward intersection in the comparatively narrow space between the rearmost of the Burlington's barges and the Canadian bank. Except for last instant changes which were useless, both vessels held course without alteration of speed and collided astern of the Burlington's last barge.

Both were held at fault.* It was the Conemaugh's duty to keep out of the way, and she was condemned for not stopping when the New York failed to answer her signals, and, after temporarily porting when she picked up the Burlington's last barge, for then starboarding and thus attempting to cross the New York's bow.

The New York claimed that she did not hear the whistles of the Conemaugh or see her lights in time to avert the collision. Her plea was substantially that which is offered by the master of the Svea in this case: that she did not "realize" until too late that the burdened vessel was not going to give way. But the court applied the objective standard. The question was, not what her offi-

*It was in the Circuit Court of Appeals decision cited by petitioners (Svea Brief 21) that the holding-on vessel was exonerated. This court reversed and condemned her.

cers *did* see or hear, but what competent officers in their place *would* have seen or heard.

> "Her officers failed conspicuously to see what they ought to have seen, or to hear what they ought to have heard."

The court further found that the New York should have observed the Conemaugh closing in toward the Canadian bank in the narrow channel, and pointed out that the New York alleged in her answer that there was not room enough for any vessel to safely pass between her and the Canadian bank, and said:

> "But notwithstanding this, she kept her course toward that bank, and was thus constantly narrowing the channel through which the Conemaugh signified her intention of passing,"

and further said that she

> "ought to have known that if she continued her course a collision would be inevitable."

Thus the New York had received distinct indication that the Conemaugh was not going to get out of the way. Citing *The Sunnyside*, 91 U. S. 208, and *The Delaware*, 161 U. S. 459, the court held that a privileged vessel must depart from her primary duty to hold course when she receives distinct indication that the burdened vessel is not going to give way. The court said:

> "Her only excuse for her omission is that she was the preferred vessel within the 19th American and 16th Canadian rule, and that by the 23d American and 22d Canadian rule it was her duty to keep her course. *But the fact that a steamer is entitled to hold her course does not excuse her from inattention to signals,* from answering where an answer is

required, or *from adopting such precautions as may be necessary to prevent a collision, in case there be a distinct indication that the obligated steamer is about to fail in her duty.* As was said in the case of *The Sunnyside,* 91 U. S. 208, 222 *sub. nom. Miner v. The Sunnyside,* 23 L. ed. 302, 307: 'Cases arise in navigation where a stubborn adherence to a general rule is a culpable fault, for the reason that every navigator ought to know that rules of navigation are ordained, not to promote collisions, but to save life and property by preventing such disasters.' See also *The Delaware,* 161 U. S. 459, 40 L. ed. 771, 16 Sup. Ct. Rep. 516; *The Maria Martin,* 12 Wall. 47 *sub. nom. Martin v. Northern Transp. Co.* 20 L. ed. 255. Both the Canadian and American Codes provide that in construing and obeying these rules due regard must be had to all dangers of navigation and to any special circumstance which may exist in any particular case, rendering a departure from them necessary in order to avoid immediate danger." (Italics ours.)

It is suggested by petitioners (Svea Brief Appendix xiv; see also pp. 9, 10) that as *The New York* arose under the old rules and was under a duty to slacken speed or stop and reverse if necessary, it is not pertinent to our situation. The decision itself is the answer. The New York was held at fault not only for not stopping and reversing, and failing to answer whistle signals, but also for failing to observe the "special circumstance" rule when she had distinct indication of the failure of the burdened vessel. For the court first discusses her failure to apprehend the special circumstances and then says:

"There is *another rule* pertinent in this connection, namely, rule 21 American, and article 18 Canadian, that every vessel when approaching another vessel so

as to involve risk of collision shall slacken her speed, or if necessary, stop and reverse." (Italics ours).

The New York violated both rules, and, inasmuch as she violated the "special circumstance" rule, the case, we submit, is directly in point.

The Admiral Watson, 266 Fed. 122
(D. C., W. D. Wash. N. D.)

Collision in Alaskan waters near Ketchikan. Helgeland was privileged vessel, both under narrow channel rule and under starboard hand passing rule. Watson was burdened. Helgeland gave Watson one whistle when vessels were one-half to two-thirds of a mile apart indicating port to port passing proper under both of applicable rules, which Watson failed to answer.

Helgeland nevertheless continued course, her pilot attempting to justify this on the claim that he had the right of way and that the Watson would surely not attempt to cross his bow, especially as there was very little space over on his starboard side. Two whistle blasts exchanged at the last minute were immaterial as collision was then inevitable.

Watson clearly at fault, but Helgeland condemned also. The court said:

> "The Watson was not in her fairway. She was far to her port side of the channel, and she was clearly in the wrong. The Helgeland was the privileged vessel. It was duty of the Watson to keep in her fairway.
>
> Under all of the circumstances, was the Helgeland justified in continuing in her course and speed after

failing to get a response to her blast, and observing the approach of the Watson, being in doubt as to what the Watson would do? Pilot rule No. 1, art. 18, provides:

'If, when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam whistle, the danger signal.'

The fact that a vessel is privileged, and entitled to hold her course, does not excuse her from adopting such precautions as may be required by statute, and necessary to prevent a collision. In The New York, 175 U. S. 187, at page 205, 20 Sup. Ct. 67, at page 74 (44 L. Ed. 126) the Supreme Court said:

'But the fact that a steamer is entitled to hold her course does not excuse her from inattention to signals, from answering where an answer is required, or from adopting such precautions as may be necessary to prevent a collision, in case there be a distinct indication that the obligated steamer is about to fail in her duty, as was said in the case of The Sunnyside, 91 U. S. 208, 222; "Cases arising in navigation, where stubborn adherence to a general rule is a culpable fault, for the reason that every navigator ought to know that rules of navigation are ordained, not to promote collisions, but to save life and property by preventing such disasters." See, also, The Delaware, 161 U. S. 459; The Maria Martin, 12 Wall. 31, 47.'

The master of the Helgeland must have known if he continued in his course a collision was inevitable. He did not give a danger signal, or stop her engines, or reverse. The Supreme Court in The New York, supra, 175 U. S. 207, 20 Sup. Ct. 75, 44 L. Ed. 126 said:

'The lesson that steam vessels must stop their engines in the presence of danger, or even of anticipated danger, is a hard one to learn; but the failure to do so has been the cause of the condemnation of so many vessels that it would seem that these repeated admonitions must ultimately have some effect.'

From what has been said it is apparent that the Watson was grossly at fault. She was not in her fairway. She failed to answer the signal. She did not maintain a proper lookout. But her unlawful and negligent conduct did not justify the Helgeland to continue in a course the inevitable result of which was collision in violation of her statutory duty, when the course of the approaching vessel was uncertain or in doubt, and her first signal unanswered. The Wakena (D. C.) 262 Fed. 989. The primary purpose of rules of navigation, as said by the Supreme Court, is not to fix arbitrary rights of the road to vessels, but rather for the safety of life and property."

The Tenadores, 298 Fed. 740, (2nd C. C. A.).

The steamships Tenadores and Murillo came into collision in New York Harbor on a clear day under conditions most favorable for navigation. The vessels were on crossing courses; the Tenadores burdened; the Murillo privileged. The Tenadores blew two whistles, thus asking a right of way (to cross the Murillo's bow) which she was not entitled to ask and which required instantaneous assent if collision were to be avoided. The Murillo cross-signaled one whistle, thereby insisting on her primary right as the privileged vessel to hold course and speed. Judge Hough condemned both vessels: the burdened vessel for asking what she had no right to ask under circumstances demanding instantaneous acquiescence to be suc-

cessful at all; and the privileged vessel for refusing that assent and continuing her course and speed when "she could have avoided collision by yielding right of way to the other vessel." The Murillo "had no right to use her privilege to produce or assist collision." After condemning both ships on these grounds Judge Hough went on to announce the admiralty *rusticum judicium* to which we have referred in the body of the brief, holding that the presumption is mutual fault when a collision like this occurs on a clear day with both ships in full view of each other and neither impeded by other craft.

The George S. Tice, 287 Fed. 127 (2nd. C. C. A.).

This collision occurred in the narrow channel between Staten Island and the New Jersey shore. The tug Ashbourne was coming down southerly from Elizabethport toward Perth Amboy. The tug Rice was proceeding northerly or up channel. They were thus passing steam vessels in a narrow channel, each bound under the narrow channel rule to "keep to that side of the fairway or midchannel which lies on the starboard side of such vessel."*

The court found that the Ashbourne was in about midchannel, perhaps slightly nearer the New Jersey shore. But she had in tow about 25 light coal boxes, making six or seven tiers. The Tice contended that, as the vessels approached, these towed craft were substantially straight behind the Ashbourne so that there was no reason why

*"In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or midchannel which lies on the starboard side of such vessel."
(Article 25 Inland Rules, 30 Stat. 101.)

the Tice with her tow of one vessel only should not pass in accordance with the rule up the starboard side of the channel between the Ashbourne and Staten Island. The Ashbourne asserted that her tow, under the wind's influence, and in the absence of any helper, was tailing toward Staten Island and visibly blocking for the Tice the whole starboard half of the channel. The court found that this blocking did take place at least before the Tice could travel from the Ashbourne's bow to the third tier of her tow. The Tice's claim and testimony that the blocking in occurred suddenly was overborne by other evidence and it was held that the Tice saw, or ought to have seen, in time that passing up to her starboard side of the channel was impracticable. On the port side between the Ashbourne and the New Jersey shore there was ample passing room.

No signals were blown. The Tice went up the starboard side, got squeezed in the narrowing space, grounded, was struck by a third tier boat of the Ashbourne's tow and was also run into from astern by her own (Tice's) tow.

The District Court held both vessels at fault. The Tice alone appealed and, in affirming, the Circuit Court of Appeals said:

> "The faults of the Ashbourne, in thus blocking the channel, in having no helper, and failing to call attention to the situation she had herself produced, are apparent and admitted. The Tice alone has appealed, and in effect insists on her right to pass port to port in this narrow channel. Of course that right existed, if she was entitled just then and at that place to pass at all. But over and underlying all the rules

of navigation is that rule of common sense, so often referred to, that no one has the right to run into collision. That one vessel is obviously at fault does not justify another in running down her or her tow; a navigator may see how wrong another is, yet he must still avoid collision, if he reasonably can. Here the Tice could have waited or gone to the other side; we do not and cannot say that either course was to be chosen and the other shunned; we do say that it was a fault unnecessarily to insist on the impossible, even if the impossibility was obedience to the starboard hand rule.

The court below was right in finding both tugs at fault, and the decrees are affirmed, with one bill of costs."

The Coamo, 280 Fed. 282 (2nd C. C. A.).

The Coamo was a freight and passenger liner; the Essex was a tug with a tow. They were approaching on crossing courses with the starboard hand rule applicable. The opinion of the Circuit Court opens with the familiar primary rules:

> "It is the duty of the privileged vessel to keep her course and speed until a departure is necessary to avoid immdiate danger; while the burdened vessel, when on a crossing course, 'so as to involve risk of collision', shall keep out of the way of the other."

The Essex was burdened but was under the delusion that she was privileged and therefore held her course and speed instead of taking steps to get out of the way. She was held at fault. Coamo, however, though the truly privileged vessel, was also condemned for not sooner realizing the position of danger created by the wrong action of the Essex and departing from her course and speed

to avoid immediate danger; also for doing the wrong thing when she, too late, *did* realize the danger. It ought to have been apparent to her that the Essex, holding course and speed, with her long tow of three barges, the second of them as far as 2500 feet astern, was failing in her duty to get out of the way. Judge Hough applied the mutual fault presumption referred to in the body of the brief (p. 33) in connection with cases of this character.

> "It is not disputed, nor disputable, that a more inexcusable collision has rarely been presented to any court. It occurred on a fair, clear day, in waters most familiar and then uncrowded, and between vessels which could without difficulty have seen each other for miles, and were (as to tug and steamer) full powered, fully manned, and in perfect repair. These are material facts in considering the probability of collision occurring without mutual fault."

The West Hartland, 2 F. (2d) 834 (9th C. C. A.).

The vessels (West Hartland and Governor) were on crossing courses at night on Puget Sound, but it was clear. The Governor was burdened. The West Hartland was privileged. The West Hartland gave the Governor a single blast signal, indicating, under the applicable inland rules, that she would hold her course and speed. The master of the West Hartland thought he was then about three-fourths of a mile away, but in fact the distance did not exceed 1500 feet. He had scarcely given the signal when he discovered that he could not carry out the proposed maneuver, so he immediately reversed his engines full speed astern without notice or warning. The Governor on her part, though the burdened vessel, held

course and speed, having mistaken the light of the West Hartland for a light on shore. When the one whistle blast was blown the Governor gave three whistles and reversed full speed astern.

The District Court found that if the West Hartland had maintained course and speed per her one blast signal and the Governor had reversed as she did, the collision would not have occurred; also that it would not have occurred if the Governor had continued on her course and the West Hartland had reversed.

Both vessels were held at fault. The Circuit Court of Appeals affirmed, but on other grounds. Judge Rudkin said:

> "But we think that the decision should be placed on broader grounds. Here two vessels collided on the broad expanse of Puget Sound, on a smooth sea, under a cloudless sky, where the lights on the vessels could be seen for miles. The excuse offered is that one of the navigators mistook the lights, and the other misjudged the distance. That there was culpable negligence on one side or both must be conceded. The fault of the Governor is not in issue here, and the excuse offered by the West Hartland is that she was the privileged vessel, and that it was the duty of the Governor to keep out of her way. This is true, in a measure, but the privilege is not an absolute one. As said by the court in The New York, 175 U. S. 187, 205, 20 S. Ct. 67, 74 (44 L. Ed. 126):
>
> 'Her only excuse for her omission is that she was the preferred vessel within the nineteenth American and sixteenth Canadian rule, and that by the twenty-third American and twenty-second Canadian rule, it was her duty to keep her course. But the fact, that a steamer is entitled to hold her course does not excuse her from inattention to

signals, from answering where an answer is required, or from adopting such precautions as may be necessary to prevent a collision, in case there be a distinct indication that the obligated steamer is about to fail in her duty. As was said in the case of The Sunnyside, 91 U. S. 208, 222: "Cases arise in navigation where a stubborn adherence to a general rule is a culpable fault, for the reason that every navigator ought to know that rules of navigation are ordained not to promote collisions, but to save life and property by preventing such disasters." * * * Both the Canadian and American codes provide that in construing and obeying these rules, due regard must be had to all dangers of navigation and to any special circumstance which may exist in any particular case, rendering a departure from them necessary in order to avoid immediate danger.'

For some considerable time before the collision, the master of the West Hartland was in doubt as to the course the Governor intended to pursue, and under such circumstances it was his plain duty to solve that doubt in favor of safety by giving a danger signal* or taking timely steps to avoid a collision before plunging his vessel into a position where a collision would be the natural, if not the necessary consequence. The Mauch Chunk, 154 F. 182, 83 C. C. A. 276; Yang-Tsze Ins. Ass'n v. Furness, Withy & Co., 215 F. 859, 132 C. C. A. 201; The Coamo (C. C. A.) 280 F. 282; The George S. Tice (C. C. A.) 287 F. 127; The Jason (D. C.) 288 F. 57.

*The West Hartland was under the Inland Rules, Article XVIII, Rule 3 of which provides:

"If when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam-whistle."

Had the West Hartland blown the danger signal in good season she would have of course corrected the Governor's misapprehension that her light was a shore light; thus giving the Governor an opportunity to perform her duty as the burdened vessel of getting out of the way. If the Governor were derelict the West Hartland would then have had indication of it in time to do something herself to avoid immediate danger.

In the Yang-Tsze Ins. Ass'n v. Furness, Withy & Co., supra, the court said:

'The loss of property for which a recovery is sought was due to a collision, on the high seas, in broad daylight and in clear weather, and with no other vessels about to embarrass or interfere with navigation. The two vessels involved were steamers, and therefore could be maneuvered more easily than any other kind of vessels. They were in plain sight of each other when miles apart. They nevertheless came into collision and with such force that one of them sank in a few hours, carrying down with her the entire cargo. *It is difficult to see how it all happened unless both vessels were in fault and failed to exercise reasonable care. Plain common sense constrains one to such a conclusion. To exonerate either of them under such conditions can be justified only if upon the closest scrutiny of the navigation of each vessel it can be discovered that one of them was free from all culpable blame.* We have examined the evidence in the case with care, and we have not been satisfied that either one of these vessels was free from fault. The vessels that navigate the high seas, and indeed vessels that navigate inland waters, intrusted with human lives and property of great value, must be held to the strictest standards of conduct, and when they fail to observe the requirements which the maritime law of the nation has prescribed, are to understand that they must abide the consequences.'

And in The Coamo, supra, the court said:

'It is not disputed, nor disputable, that a more inexcusable collision has rarely been presented to any court. It occurred on a fair, clear day, in waters most familiar and then uncrowded, and between vessels which could without difficulty have seen each other for miles, and were (as to tug and steamer) full powered, fully manned, and in per-

fect repair. These are material facts in considering the probability of collision occurring without mutual fault.'

In those cases the collisions occurred in the daytime while here the collision occurred at night, but notwithstanding this difference the vessels could be here seen through the darkness for miles and the collision was equally inexplicable and equally inexcusable."

The Devonian, 110 Fed. 588.

In this case the English steamer Devonian on a voyage from Liverpool to Boston, and the three-masted schooner Perry proceeding from Boston to Rockport, came into collision in Boston harbor. The weather was clear, the water smooth, the wind light from the southeast. The steamer entered a narrow channel which was temporarily partially blocked by a dredge which was deepening the channel. The temporary channel was only 300 to 500 feet wide and 2000 to 2500 feet in length. Just as the Devonian entered this channel she sighted the schooner coming out of a fleet of moored vessels and proceeding down the channel. She immediately stopped and reversed and sent a tug forward to get the schooner out of the way but without success. The schooner had previously sighted the steamer but had lost sight of her while tacking through the anchored fleet and did not see her again until she had entered the channel and the tug which had been sent forward by the steamer attracted attention by her whistle. The steamer could not maneuver to get out of the way in the narrow channel and the schooner could not stop. The schooner came on very slowly, drifting with the tide and struck amidships against the steamer's stem. Noth-

ing was done on the schooner until the last moment when the helm was put up without effect owing to the lightness of the wind. The steamer was clearly at fault for failing to keep out of the way. The schooner attempted to exonerate herself by asserting that she held her course as required by the rules. The court, however, held that the schooner should have known that the steamer was large and would have difficulty maneuvering in the narrow channel and was at fault for failing to take seasonable action to avert the collision. After discussing the faults of the burdened vessel, which failed to get out of the way, the court said (page 592):

> "The court has next to consider if the schooner also was at fault. She had no lookout. Her counsel contended that the want of a lookout did not contribute to the collision; that she kept her course, and that this was her only duty; but the privileged vessel has no right to keep her course with her eyes shut. The rule requiring a lookout is imposed alike upon the burdened and privileged vessel. The duty of the privileged vessel is to hold her course; the duty of the burdened vessel is to keep off that course. *But the privileged vessel is to hold her course, constantly observing the burdened vessel, in order to notice if the latter fails in her duty. When the failure of the burdened vessel becomes apparent, the privileged vessel must change her course as prudence commands.*" (Italics ours.)

The Jason, 288 Fed. 57 (D. C. S. D. N. Y.).

Here The Jason and The Westfield were proceeding from their respective anchorages in or near to Lynnhaven Roads, to join a convoy of 30 or 40 vessels that was forming in position for departure to Europe, outside of

Cape Henry. They came into collision on a clear day, with no complications of wind or tide, and each vessel held on without material change of course and speed until right in the jaws of the collision. There was considerable conflict in the testimony whether the Westfield was being overtaken or whether the vessels were on crossing courses. The court did not decide this question, but held both vessels in fault, saying:

> "Specific rules of the road are of course to be obeyed, and failure so to do usually brings about the imposition of liability. It is, however, also the law that neglect upon the part of one ship to observe a specific rule does not excuse another in dangerous proximity to the first from taking cognizance of the general prudential rule which requires that due regard must be had for any special circumstances which may render a departure from specific rules necessary in order to avoid a collision.
>
> As I see the case, there was a woeful failure of both vessels in this particular, and that, irrespective of whether the Westfield was being overtaken, or was on a crossing course, and herself bound to keep out of the way. As was held in The John H. Starin, 162 Fed. 146, 89 C. C. A. 170, there is no right of way on which a vessel is entitled to insist, when it is obvious that it will result in collision. There is much more authority to the same effect, and it is so well known to all of us as to make its citation unnecessary. Whatever may here have been the start of the trouble, and, as to that, one man's guess is as good as another's, each ship saw that the other was holding on to a course that would, in short order, bring about a collision. If one ship had the right of way, and the other was infringing on that right, it is a wonder the whistle did not protest the fact. When the usurpation of unentitled privileges was further

insisted upon, with danger becoming more imminent with every turn of the propellers, one captain shouted to an unseen officer upon a boat 150 feet away and allowed his precautionary measures to end with the shout. And upon the other ship not even a cry was raised. It seems to me it was high time for danger signals. Indeed, it was ripe for more than that; the moment had come for affirmative action in the way of stopping the ships. It was not taken until the last instant when the reversal of the Westfield's engines may perhaps have accelerated the collision. This may, or may not, have been the swerve of which the witnesses speak. If it was, it is quite possible that the angle of vision of the observers was such as to give the impression that the swerve was made by the Jason.

Be this as it may, I have made up my mind that each vessel fell so far short of its duty in the presence of an easily avoidable danger as to require that both be held at fault."

The Senator Rice, 223 Fed. 524 (2nd C. C. A.).

The tugs Senator Rice and Luzerne on crossing courses came into collision in New York Harbor. The Luzerne, with a carfloat lashed alongside, was crossing East River and bound from the New York to the Jersey side. The Rice, with a tow, was coming up river and was on the port hand of the Luzerne, hence the Rice was burdened and the Luzerne privileged. The situation involved risk of collision when it first developed. The Rice blew two blasts, indicating that she would continue on her course and pass the Luzerne starboard to starboard. The Luzerne answered with one blast, thus expressing her dissent to the Rice's proposal, and both vessels held course and speed until collision was inevitable. Both vessels were held in fault, the court saying:

"It seems to us that in view of the fact that the Rice had reason to believe, if, in fact, she did not know, that the Luzerne was destined for Jersey City as soon as she got straightened out, that the starboard-hand rule applied. The least the Rice should have done was to slow down, which she could easily have done in the ebb tide, and wait until the situation developed. This is equally true of the Luzerne and results in both parties being held negligent for not recognizing a dangerous situation and waiting until it developed sufficiently to enable them to navigate safely. Such a result seems to us to be the best solution of a collision which appears to have been due to the stubbornness of both parties. *That such a collision should have occurred in broad daylight at a time when there was nothing in the elements to interfere with navigation seems inexplicable. It is hardly possible that the stupidity or obstinacy of a single master could have produced such a result, and we think the collision was due to their combined action. Where property and life are at stake neither party should insist upon persisting in a course which is likely to result in disaster when the delay of a few moments will insure the safety of both.*" (Italics ours.)

Appendix "B"

REVIEW OF CASES RELIED ON BY THE SVEA.

These cases do not disturb the "distinct indication" doctrine. In some of them the holding-on vessel is exonerated either because there was no distinct indication until collision was inevitable or because the holding-on vessel took seasonable action when she received indication. In other cases the holding on vessel is condemned either because she took action without distinct indication or long before there was "immediate danger of collision", or in an occasional exceptional case like the *Orduna,* infra, negligently did exactly the wrong thing.

It will be noted that most of the cases involve either navigation in crowded harbors or the receipt of indication *in extremis;* thus putting them in sharp contrast with the case at bar where the Svea had long observation of the approach of the Newport in open waters.

For the English law the Svea cites in the Appendix to its brief *The Gulf of Suez,* 15 Asp. 328, *The Orduna,* 14 Asp. 574, and *The Byfoged Christensen,* 4 App. Cas. 669. In *The Orduna* the holding-on vessel, having indication, took action which, however, was condemned by four nautical assessors as negligent. In *The Gulf of Suez* the holding-on vessel, having indication, took timely and appropriate action and she was accordingly absolved of blame. In *The Byfoged Christenson* the adherence to primary duty by the holding-on vessel was approved because she had no distinct indication of dereliction by the

giving-way vessel. These cases are considered in the ensuing paragraphs.

No exception can be taken to these conclusions. But the English case most analogous on fact to the Newport-Svea collision is *Nautik v. Oostvoorne*, 6 Lloyds List 110. Our opponents dismiss it with the statement that it involved overtaking not crossing vessels (Svea Brief, Appendix XV). The statement is erroneous. The opinion finds crossing courses (though originally overtaking). The privileged vessel like the Svea stood on into collision and the opinion contains the best English exposition we have found of the difficult, *and* responsible, situation of a privileged master under such circumstances. This exposition is given at page 47, supra, of this brief.

The Orduna, 14 Asp. 574.

The Orduna was privileged and the Konakry burdened on crossing courses, though almost opposite. Both vessels held course and speed until they were only about a quarter of a mile apart. Then the Konakry ported and the Orduna starboarded, apparently at the same time. The Konakry did not signal her change of course. The excuse of the navigating officer of the Orduna for failing to hold his course and speed was that he assumed that it was not a case of crossing so as to involve risk of collision at all, because the Konakry had almost finished crossing his bow and he was therefore justified in starboarding his helm in order to give the Konakry a wider berth.

The court, however, held that vessels are on crossing courses until they have actually cleared. That is to say,

both when they are approaching the crossing and while they are crossing.

The opinions in the Court of Appeal all seem to assume that the Konakry's extraordinary action before she ported at a quarter of a mile was indication that warranted the Orduna in taking action, but condemned her because the four nautical assessors, two in the court below and two in the court above, agreed that the action she took showed "want of care and skill and proper seamanship." She starboarded and hard astarboarded, thus throwing herself directly across the line of the Konakry instead of reversing.

The Gulf of Suez, 15 Asp. 828.

The Gulf of Suez was the giving-way vessel and the Gustav the holding-on vessel. The Gustav was crossing the river Mersey. The Suez was coming up the river. The Gustav ported to counteract an ebb tide and twice gave single blast signals. She then steadied and held course and speed across the river. Some claim was made that these signals were misleading, but the evidence showed that the Suez was not misled and observed the Gustav continuing on a steady course. The Suez twice starboarded and blew two blast whistles, thus essaying to go across the bow of the privileged vessel. With these indications of dereliction on the part of the burdened vessel, the Gustav reversed and was found to have been practically still in the water when the collision occurred. She was held to have taken timely and appropriate action, which would have averted the collision had not the Suez, after stopping and slowing, gone full speed ahead again.

The Byfoged Christensen, 4 App. Cas. 669, 4 Asp. 201.

The passage quoted on pages IV-V of the Svea's Appendix emphasizes that the circumstances must be exceptional to warrant departure from course upon the part of the holding-on vessel. To this of course we take no exception. Our case is predicated on special circumstances. The passage quoted also points out that there was *no constat* at what particular time the master of the holding-on vessel ought to have come to a distinct conclusion that the other vessel was not about to obey the rule. Without distinct indication of dereliction upon the part of the giving-way vessel the holding-on vessel was of course not justified in departing from her prima facie duty. We have no quarrel with this law.

The Britannia, 153 U. S. 130.

The Britannia and the Beaconsfield came into collision off Governor's Island in New York Harbor. The Britannia was burdened and the Beaconsfield privileged. The Britannia coming in from sea rounded Governor's Island so closely that she had to go full speed ahead to avoid grounding. The Beaconsfield was bound out to sea, and the vessels sighted each other just as the Britannia was clearing herself from the threatened stranding and was putting on full speed. At this time the Beaconsfield was slightly off the Britannia's starboard hand. The vessels exchanged single whistle blasts, which signified an agreement that the Britannia would swing to starboard and pass astern of the Beaconsfield. On account of current and eddy conditions the Britannia's swing to starboard was delayed

and she was temporarily pulled off to port. The Beaconsfield then sounded another single blast, which still signified her expectation that the Britannia would pass astern, and, hearing no answer, put her helm hard aport and stopped and reversed. Collision resulted. If the Beaconsfield had held course the vessels would have cleared. Both vessels were held at fault.

The Beaconsfield attempted to excuse herself by asserting that the failure of the Britannia to go promptly to starboard made the situation one of special circumstances and justified her in stopping and reversing. The court held, however, that the pilot of the Beaconsfield was "well aware" of the condition of the current which delayed the Britannia and that the course of the latter vessel was "precisely what might have been anticipated," and held the Beaconsfield in fault for overlooking the effect of this current. The court said:

> "Her excuse, in application of Rule 24, is that the Britannia, after having signalled that she was going astern, did not appear to be doing so, and that this erratic behavior justified the Beaconsfield in stopping and reversing. But, as already stated, the pilot of the Beaconsfield was well aware of the existence of the counter current against which the Britannia had to contend in changing her course to the starboard, and if we are obliged to impute fault to the Britannia, in not having foreseen and provided against that current, so we must likewise blame the Beaconsfield for overlooking the effect of such current in delaying the movement of the Britannia to the starboard. The course of the Britannia was precisely what might have been anticipated, after her first and only fault, and did not, in our judgment, warrant the Beaconsfield in disregarding the injunctions of the twenty-

third rule, which, if obeyed, would have prevented the collision."

Here again we have the court applying the objective standard to the conduct of the master of the privileged vessel. The indications were that the Britannia would clear, and the fact that this particular master failed to take into account what he should have considered did not excuse him.

The Breakwater, 155 U. S. 254.

This collision occurred in the North River, New York Harbor. The vessels involved were the Pavonia, a ferry-boat, and the Breakwater, a steamship. The Pavonia was coming out from her pier on the New York side of North River to go across to the New Jersey side. The Breakwater was coming up the North River.

As she emerged from her pier the Pavonia blew the customary long blast. Thereupon the Breakwater blew one whistle, indicating that she was directing her course to starboard—in other words, proposing to pass astern of the Pavonia and between her and the New York pier line. The Pavonia answered with one whistle, establishing this understanding. Twice thereafter the understanding was confirmed by exchange of one-blast whistles. When she blew the first time the Breakwater stopped her engines; when she blew the second time she reversed them.

So far, therefore, from there being any indication that the burdened Breakwater was about to fail in her duty, *every indication* was that she was going to perform her

duty of keeping out of the way by passing astern of the Pavonia.

There was a northwest wind and an ebb tide. The effect of this wind and tide was to cause the Pavonia to sag down stream. To counteract this tendency as far as she could, the Pavonia went ahead at full speed under a hard-aport helm.

The Breakwater failed to pass astern of the Pavonia, and struck her.

There was, as we have said, manifestly no indication to the Pavonia that the Breakwater was going to fail in her duty; but, on the contrary, every indication that she was going to fulfill her obligation. In any event, however, the Pavonia could have done nothing better calculated to avoid the collision than precisely what she did. The court said that

> "her only safe course was to do exactly as she did—put her wheel hard aport and her engine at full speed."

Even, therefore, if there *had* been indication the Pavonia could not have been condemned, because, obviously, you can not hold a privileged vessel at fault when there is only one thing she can do to avert collision and she does it.

The Breakwater claimed, apparently apart from any question of indication, that the Pavonia ought not to have left her pier when a vessel was coming up stream, but this contention, which is not important for our purpose, was rejected. The contention that the Pavonia should

have reversed under the old rule that both steam vessels crossing so as to involve risk of collision shall if necessary slacken speed or stop or reverse, was also rejected —on the ground that that rule must be reasonably construed, and that to have reversed under the prevailing wind and tide conditions would only have increased the tendency of the Pavonia to sag down stream.

The Binghamton, 271 Fed. 69 (2nd C. C. A.).

Binghamton privileged. Sagua burdened. Vessels under starboard-hand crossing rule. Sagua went with unabated speed to point of collision. Her only indication other perhaps than holding course (and it does not appear for how long) that she was not going to fulfill her duty to get out of the way was a two blast whistle blown only 1000 feet from intersection when, as Judge Hough says, it was almost criminal for her to propose crossing the privileged vessel's bow. But even this late indication was not conveyed to the Binghamton because the latter blew the danger signal simultaneously and the Sagua's two whistles were blanketed. However, the Binghamton *did* reverse at that time and was of course excused. While reversing earlier might have averted the collision, she could not be condemned for not acting before she had distinct indication.

> "The statement or wording of the rule can no longer be questioned in this court. It is the duty of the privileged vessel to keep 'on her course until a departure is necessary to avoid immediate danger,' and the rule as to speed is the same as that regarding the course. Yang-Tsze Ass'n etc. v. Furness, 215 Fed. 859, 861, 132 C. C. A. 201, certiorari dismissed

242 U. S. 430, 37 Sup. Ct. 141, 61 L. ed. 409. The fact that subsequent events show that stopping and backing on the part of the privileged vessel would have avoided collision does not prove negligence. The Musconetcong, 255 Fed. 675, 677, 167 C. C. A. 5."

That the Binghamton is not in conflict with the other Second Circuit cases which we have discussed in the brief is evidenced by the following passage from

The Tenadores, supra, p. vii,

which held the privileged vessel in fault.

"Tenadores was the burdened vessel, under the rules, and her prime duty was to keep out of Murillo's way, while the latter had no right to use her privilege to produce or assist collision; the measure of her duty we last restated in The Binghamton, 271 Fed. 69, and see no reason to go over that ground again."

The Haida, 191 Fed. 623 (D. C. S. D. N. Y.).

Two yachts were involved, the Haida and the Natalie. The Natalie was burdened and was run into by the Haida. She claimed the Haida was at fault because she did not observe that the Natalie was going to fail in her duty to keep out of the way; that she should have noted this and taken steps to avert the collision. There was no distinct indication of this prospective failure upon the part of the Natalie. The Haida was herself burdened in respect to another vessel and "could not under these circumstances be expected to give the same attention as otherwise to the vagaries of other boats to which she owed no duty except after their own default."

The Chicago, 125 Fed. 712 (2d C. C. A.).

The Augusta, privileged, was coming up the North River. The Chicago, burdened, was a ferry boat crossing from the Jersey to the New York side. A third vessel, the ferry boat Fanwood, was also crossing. The Augusta gave single blast signals to the Fanwood which she met first and the Fanwood stopped and allowed the Augusta to pass. Then the Augusta observed the Chicago and signalled her by single blasts that she proposed to hold her course and speed and expected the Chicago to keep out of the way as the Fanwood had. The Chicago, however, got to within 400 feet of the point of collision before she saw the Augusta. Though burdened, the Chicago gave at this late time a two blast crossing signal and went full speed ahead in an attempt to cross the Augusta's bow. Collision ensued.

The Chicago was of course condemned. It was claimed that the Augusta should be condemned also for not reversing, instead of merely stopping, when she got the Chicago's two blast crossing signal; but that signal was given so late as to be almost criminal and it was held that if the Augusta committed error in not reversing instead of stopping, the error was only in judgment and *in extremis* and the Augusta was excused. She was entitled to leniency both because the indication was criminally late and because her attention had previously been distracted by the Fanwood.

The Cygnus, 142 Fed. 85 (2nd C. C. A.).

1. Cygnus burdened. Dimock privileged.

2. Dimock had come down East River, rounding the Battery and was coming up the North or Hudson River

to her pier on the New York side. Cygnus was crossing North River from the New Jersey side to the New York side. Cygnus had the Dimock on her starboard hand and they were on crossing courses.

3. Whistles blown. Cygnus blew two, Dimock answered one. Cygnus a second time blew two and Dimock again answered one. Cygnus "heard no other whistles, though there is little doubt that the Dimock blew a third one."

4. Cygnus clearly at fault, being the burdened ship and failing to keep out of the way. The explanation, on Cygnus' side, is that she supposed that by blowing two whistles before the Dimock answered with one she obtained the right of way. She did not.

5. Dimock not at fault. She got two blasts twice from the Cygnus and heard them, but she always answered with one signifying her intention to hold her course and speed as she was entitled to do as the privileged vessel.

6. The two blast signals did not constitute distinct indication from the burdened Cygnus to the privileged Dimock because they were given and their proposal rejected well before there was danger of collision. It was, as the opinion states, quite in order for the Cygnus to propose going ahead of the Dimock while there was still ample time for safe execution of that maneuver. When, however, the Dimock repudiated the proposal, the respective duty and obligation remained unaltered: the Dimock was to hold course and speed, the Cygnus to keep out of the way. The fact that the Cygnus nevertheless kept on

was no indication that she would not get out of the way in time; for the Cygnus was a paddle wheel ferry and could check her headway promptly. She did not do so because her navigator was under the erroneous impression that having been the first to signal she thereby obtained the right of way despite the Dimock's rejection. But the Dimock could not read the mind of the Cygnus and this impression was not conveyed to her.

The Musconetcong, 255 Fed. 675 (2d C. C. A.).

The hold-on vessel was exonerated in this case and properly. She rejected the two blast proposal of the burdened vessel to cross her course, waited briefly to see whether the burdened vessel would accept the rejection and seeing that she did not, took affirmative action herself by reversing to avert the threatened collision. She was entitled to reasonable latitude as respects time of action as she was navigating in a crowded harbor and the situation was confused by the proximity of two other vessels. The case is one of indication and seasonable action thereon upon the part of the privileged vessel.

The foregoing seem to be the cases principally relied upon by the Svea. We do not find in the other cases cited in her behalf anything to excuse a holding-on vessel for failure to take steps herself to avert collision once she has had distinct indication that the giving-way vessel is about to fail in her duty.

Supreme Court,
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CHARLES ELMORE

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1927

No. 146 and No. 173

HENRY WILSON, F. A. WILSON, W. T. WILSON, et al., *Petitioners,* vs. PACIFIC MAIL STEAMSHIP COMPANY, STEAMSHIP NEWPORT, her engines, boilers, tackle, etc., and J. MCKINNON, Master of said vessel, *Respondents.*	No. 146
PACIFIC MAIL STEAMSHIP COMPANY, Claimant of the STEAMSHIP NEWPORT, her engines, boilers, tackle, etc., and J. MCKINNON, Master of said vessel, *Cross-Petitioners,* vs. HENRY WILSON, F. A. WILSON, W. T. WILSON, et al., *Cross-Respondents.*	No. 173

BRIEF FOR CROSS-PETITIONERS IN CAUSE NO. 173

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Grounds on Which Jurisdiction of the Court is Invoked.

This is a case in admiralty decided by the Circuit Court of Appeals for the Ninth Circuit, affirming in part the judgment of the United States District Court for the Southern District of California (238, 239, 249)*. The Opinion and Decree of the Circuit Court of Appeals were filed November 1, 1926 (249, 250). The judgment of that court is made final by provisions of the Judicial Code, (43 Stat. 936).

Cross-Petition for certiorari was filed January 28, 1927 pursuant to the statute providing for review in this court by certiorari of cases in which the judgment of the Circuit Court of Appeals is made final (43 Stat. 936). Certiorari was granted March 14, 1927.

*Numbers in parentheses refer, unless otherwise stated, to pages of the Record.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1927

No. 146 and No. 173

HENRY WILSON, F. A. WILSON, W. T. WILSON, et al., *Petitioners,* vs. PACIFIC MAIL STEAMSHIP COMPANY, STEAMSHIP NEWPORT, her engines, boilers, tackle, etc., and J. MCKINNON, Master of said vessel, *Respondents.*	No. 146
PACIFIC MAIL STEAMSHIP COMPANY, Claimant of the STEAMSHIP NEWPORT, her engines, boilers, tackle, etc., and J. MCKINNON, Master of said vessel, *Cross-Petitioners,* vs. HENRY WILSON, F. A. WILSON, W. T. WILSON, et al., *Cross-Respondents.*	No. 173

BRIEF FOR CROSS-PETITIONERS IN CAUSE NO. 173

STATEMENT OF THE CASE.

Cause No. 173 comes before this court on a cross-petition for writ of certioriari. Cross-petitioners are the

owner and master respectively of the steamer Newport. Cross-respondents are the owners of the steam schooner Svea. The Newport and the Svea were in collision some twelve miles off Point Buchon, California, on the morning of November 29, 1922. The Svea interests libeled and the Newport interests cross-libeled. The libel filed by the owners of the Svea was in rem against the Newport but joined as party respondents, not only her owners but also George (J.) McKinnon,* her master (2). The pleadings on behalf of the claimant and master of the Newport admitted fault, but denied the master's personal participation therein (30).

The District Judge held the Newport solely at fault and entered up a decree against her and her owner, Pacific Mail Steamship Company; also against Captain McKinnon (55). In the opinion of the District Judge (63, 2 F. (2d) 255) the question of the master's liability was not discussed, nor was there any evidence or finding that he was personally negligent.

The captain was an experienced shipmaster. He is now seventy-eight years of age; at the time of the collision he was seventy-three. He had been going to sea for fifty-eight years and had held master's papers for thirty years. He was rated commodore of the Pacific Mail fleet. This was his first collision (104).

The morning of the collision was bright and sunny; the sea calm and the wind negligible. No other vessels

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*Captain McKinnon was called "J." McKinnon in the Svea's original libel and that description has continued through the titles of the pleadings, etc., though "George" McKinnon is the correct name (33, 104).

were in sight. Captain McKinnon had left his duly licensed third officer in charge of the bridge and had gone below to his cabin (121) some twenty minutes before the collision (105). Glancing through a port in the lavatory just before the vessels came together he saw the approaching Svea and rushed to the bridge (122), but it was too late to do anything to avert the collision.

On appeal from the decree of the District Court (55) the Circuit Court of Appeals for the Ninth Circuit reversed that part of the judgment holding the Newport solely at fault and held the Svea in mutual fault with the Newport, but affirmed that part of the judgment holding Captain McKinnon personally liable (239, 249, 15 F. (2d) 342). The Court of Appeals accepted it that the evidence excused the master from personal negligence, but on the authority of certain state and District Court cases and text writers felt impelled (reluctantly, as we read the opinion) to sustain the proposition that the master of a vessel, although personally free from fault, is liable for the negligent acts of his subordinates.

The owners of the Svea filed a petition for writ of certiorari to review the holding of the Circuit Court of Appeals that the Svea was at fault with the Newport. Certiorari was granted January 30, 1927. These cross-petitioners asked certiorari on that part of the judgment holding Captain McKinnon personally liable. This cross-petition was granted March 14, 1927. On order of the court these two causes have been consolidated for hearing and argument. Separate briefs are being filed in Cause No. 146 on the question of the fault of the vessels. The

present brief in Cause No. 173 is confined to the question of the master's liability.

SPECIFICATION OF ERROR.

The Circuit Court of Appeals erred in deciding that Captain McKinnon was properly held liable for the negligence of the third officer of the Newport.

PRELIMINARY STATEMENT.

The point involves an important question of federal law which has not been, but should be, settled by this Court. The question is novel and has been rarely adjudicated. Notwithstanding the statements made in several American texts, that it is a settled rule peculiar to the mercantile law that a shipmaster is responsible for the negligence of all employed on board the vessel, examination of the books reveals a marked dearth of authority. We have found no decision of this Court, or of any Circuit Court of Appeals, passing on this question; only one District Court case, and only one case from an English court.

According to our search, there have been but ten cases which have definitely passed upon the question whether a shipmaster is subject to this exceptional rule of liability. Six of these have held that he is. Three of these six are from the New York State Court; one is a Federal District Court case; and two are Louisiana cases which

seem to us to be overruled. Of the four cases holding to the contrary, two are from Louisiana, one from the Court of Common Bench in England, and one from the Supreme Court of Victoria, Australia. The textwriters of this country generally state that the master is under this exceptional liability; the English textwriters are contra. Until this case, there have been no adjudications on this point, so far as we can find, since 1885.

OUTLINE OF ARGUMENT.

I.

The ruling that the master of a vessel, although not personally negligent, is legally liable for the torts of his subordinates, is in conflict with the established doctrine of *respondeat superior*.

An intermediate servant is not liable for the torts of subordinates in the absence of personal negligence.

II.

The authorities relative the liability of a shipmaster for the torts of subordinates are in conflict. Those holding him liable, although free from personal fault, are based either upon fallacious reasoning or upon a misconception of previous authorities.

A. The authorities holding a master liable.

1. The leading case (*Denison v. Seymour*) is based on fallacious reasoning.

2. The leading text (*Story on Agency*) is based on a misconception of previous authorities.

3. The remaining authorities are based either on *Denison v. Seymour* or *Story* or announce the rule without reasoning or authority.

B. The authorities holding the master not liable.

III.

Even if there once were a possible basis for holding a shipmaster liable for the negligent acts of his subordinates, the reason for such harsh doctrine has ceased to exist and the rule should no longer be applied.

A. The considerations which conceivably may have warranted the imposition of such liability are not present under modern conditions of ship operation.

B. The reason for the rule having ceased, the authorities applying it should not be followed. *"Cessante ratione legis, cessat ipsa lex."*

ARGUMENT.

I.

THE RULING THAT THE MASTER OF A VESSEL, ALTHOUGH NOT PERSONALLY NEGLIGENT, IS LEGALLY LIABLE FOR THE TORTS OF HIS SUBORDINATES IS IN CONFLICT WITH THE ESTABLISHED DOCTRINE OF RESPONDEAT SUPERIOR.

An Intermediate Servant is Not Liable for the Torts of Subordinates in the Absence of Personal Negligence.

We deem it to be settled law that an intermediate servant (or as he is sometimes denominated, intermediate superior employee or middle man or superior or interme-

diate agent or superior servant) is not liable for the negligent acts of a servant under him. The two parties who *are* liable for such negligence are:

First: The inferior servant because of his personal negligence;

Second: The owner or principal under the doctrine of *respondeat superior* because the work in course of which the negligence was committed was being done for his benefit.

The intermediate servant, in the absence of personal negligence, is not held.

This rule is so well settled that we merely refer in passing to the leading case:

> *Stone v. Cartwright,* 6 Term. Rep. (Durn & East 411); 101 Eng. Reprint Reports 622,

where Lord Kenyon said:

> "In all these cases I have ever understood that the action must either be brought against the hand committing the injury, or against the owner for whom the act was done; but it was never heard of that a servant who hires laborers for his master was answerable for all their acts,"

and to

> *Brown & Sons Lumber Company v. Sessler,* 128 Tenn. 665; 163 S. W. 812;
>
> *American Annotated Cases,* 1915 C, 103 and cases cited;
>
> *Mechem-Agency,* 2nd Ed., Sec. 1643.

Under the general and well established rule, therefore, judgment would not lie against the master of the New-

port. To sustain the judgment against him in this case it must be found that the case of a shipmaster is an exception to this general rule. Is it?

II.

THE AUTHORITIES RELATIVE THE LIABILITY OF A SHIPMASTER FOR THE TORTS OF SUBORDINATES ARE IN CONFLICT. THOSE HOLDING HIM LIABLE, ALTHOUGH FREE FROM PERSONAL FAULT, ARE BASED EITHER UPON FALLACIOUS REASONING OR UPON A MISCONCEPTION OF PREVIOUS AUTHORITIES.

A. The authorities holding a master liable.

The six cases to which we have hitherto adverted are:

Denison v. Seymour, 9 Wend. 9, 11 N. Y. (C. L.) 515 (1832);

Foot v. Wiswall, 14 Johns, 304 (1817);

Kennedy v. Ryall, 67 N. Y. 379 (1876);

The City of New York, 25 Fed. 149 (1885);

Buel v. New York Steamer, 17 La. Rep. 541 (1841);

Daret v. Gray, 12 La. Ann. 394 (1857).

There are also various text writers who lay down the same rule, such as

Story on Agency, 7th ed., Secs. 313-318;

Shearman and Redfield on Negligence, 6th ed., Vol. 2, Sec. 246, p. 712;

Spencer on Collision, Sec. 182;

Kay on Shipmasters and Seamen, Vol. 2, p. 1153;

36 *Cyc.* 150;

11 *C. J.* 1172.

We think it may properly be said that *Denison v. Seymour* is the leading case and *Story on Agency* the leading text recognizing the exception.

1. **The leading case (*Denison v. Seymour*) is based on fallacious reasoning.**

It is submitted that the reasoning of *Denison v. Seymour* is unsound. It is:

The master of a merchant vessel serves voluntarily; he may choose his own officers. If the owners insist on incompetent officers the master is at liberty to leave the service; therefore, having voluntarily taken the ship and approved of his subordinates, he is responsible for their negligence.

The result, we respectfully suggest, is a *non-sequitur*. It may be that the master should be responsible if he negligently employs or negligently approves the employment of incompetent subordinates; but there is no sound reason why he should be responsible for the negligent acts of a licensed officer not known to him to be incompetent.

Denison v. Seymour cites for its holding *Bowcher v. Noidstrom*, 1 Taunt. 568; 127 Eng. Rep. 954, and

Foot v. Wiswall, 14 Johns, 304.

The *Denison* opinion says that in *Bowcher v. Noidstrom*

> "*it seemed* to be taken for granted that the captain was liable, and in which case the court *seemed* to acknowledge the principle that the master was liable for the conduct of a pilot on board his vessel; but as that was an action of trespass, and the captain had done no act, they directed a non-suit." (The italicizing is ours.)

Reference to *Bowcher v. Noidstrom,* decided in 1809, shows that it is far from definite authority that the ship master is liable for the negligent acts of his inferior officers, and of this case Lord Justice Best said in *Hall v. Smith,* 2 Bing. 156; 130 Eng. Rep. 265:

> "In Bowcher v. Noidstrom (1 Taunt. 568) Lawrence, J. mentions the case of the captain of the 'Russell' man of war who was held answerable for the act of one of the lieutenants, who had command of the watch, in running down an Indiaman, whilst the captain was asleep in his cabin. When or by whom that case was decided I do not know; but it is supported by no other decision that I am aware of, and its authority is shaken by the judgment of the case in which it is cited."

Foot v. Wiswall, the other authority cited to the point in the *Denison* case, contains no discussion of the question.

2. The leading text (*Story on Agency*) is based on a misconception of previous authorities.

Story on Agency, 7th ed., Sec. 313, recognizes the general rule that the middle man is not liable for the tortious acts of an under servant. In Section 314 the learned author states that the case of a shipmaster is an important exception to this general rule and in Section 316 specifically asserts that a master of a vessel is personally responsible for a collision due to the negligence of a pilot. In Section 317 it is stated that this exception to the general rule is adopted in the maritime jurisprudence of the modern commercial nations of continental Europe, it having been derived from the same common source—

the Roman law. And in text and footnotes the writer refers to the Digest of Justinian and other ancient texts.

It is with deference that we venture to criticize Story. But we must respectfully submit that an examination of the Digest discloses that the statements therein do not support the proposition advanced by the text.

The portions of *The Digest* cited by the author all refer to the obligation of the *exercitor* of a ship in relation to the custody of goods belonging to passengers. And in each passage this obligation is considered in connection with the obligation of innkeepers* and stablekeepers** to the guests. It is said that each of these three classes, *exercitors* of ships, innkeepers and stablekeepers are responsible irrespective of fault to their passengers or guests for the safety of their goods.

Thus, Title IX of Book IV of *The Digest* is captioned

> "Seamen, Innkeepers, Stablekeepers to restore what they receive."***

The seventh section of Title IX clearly shows that the responsibility under discussion is that of the *exercitor* for the acts of seamen causing damage to goods of the passengers *committed on board the ship*:

> "ULPIANUS (on the Edict 18). The *exercitor* is bound to answer for the behavior of all his seamen,

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*cauponae.

**stabuli.

***_The Digest of Justinian._ Translated into English. Charles Henry Monro, Vol. I, p. 294, Cambridge, University Press, 1909. The Digest has explained what is meant by "Seamen" (nautae) in this connection and has given it the restricted meaning of *exercitor*. Dig. Lib. IV, tit. 9, Introd; Story, ibid, 392, n. 2.

whether they are slaves or free; and it is quite reasonable that he should be answerable for their behavior, as he himself employed them at his own risk. But he is only answerable where the damage is committed on board the ship; if it happens off the ship, even by the act of the seamen, he is not responsible. Moreover, if he gives notice beforehand that all the passengers are to look after their own goods, and that he will not be answerable for damage or loss, and the passengers agree to the terms of this notice, then he cannot be sued. 1. The action *in factum* referred to is for double damages. 2. If the seamen should do any damage to one another's property, this does not concern the *exercitor.*"

The Institutes of Justinian, Book IV, Title V, Section 3, also lay down this same rule of responsibility—again considering the *exercitor,* innkeeper and stablekeeper together:

"Similarly ship-owners, inn and stablekeepers are liable as on a quasi-delict for wilful damage or theft committed in their ships, inns or stables, provided the act be done by some or one of their servants there employed, and not by themselves; for the action which is given in such cases is not based on contract, and yet as they are in some sense in fault for employing careless or dishonest servants, their liability would seem to be quasi-delictal."

The Institutes of Justinian, Translated into English, J. B. Moyle, Fourth Edition, page 173, Oxford-Clarendon Press.* 1906.

See virtually the same passage in *The Digest,* Lib. XLIV, Tit. VII, 5, 6.

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*The original text is given in *Imperatoris Justiniani Institutiones,* By J. B. Moyle. Fourth Edition, page 539. Oxford, Clarendon Press, 1903.

And Mr. Justice Story himself, in a later portion of his work recognizes that the Roman law only applied the principle of *respondeat superior* in certain cases and states that:

> "Masters and employers of ships, innkeepers, and stablekeepers, were made responsible for the safety and due delivery of the goods committed to their charge;"
>
> *Story,* ibid, Sec. 458, 459, 460.

This liability of *exercitors,* innkeepers and stablekeepers was an exceptional responsibility placed only on these particular classes in connection with the custody of the property of their guests or passengers.

> "The true reason for this exceptional responsibility was the exceptional confidence which was necessarily reposed in carriers and innkeepers."
>
> *O. W. Holmes, Jr., The Common Law,* p. 16, Little, Brown & Co., Boston, 1881.

> "Is the owner of a ship liable for a theft committed on board? It has been decided that he is. For if a sailor or innkeeper receive any person with his goods, he seems to undertake that his vessel or lodgings shall be calculated for the purpose, and that everything shall be safely restored. He is answerable therefore, if a loss happen, or an injury be sustained, though without his fault."
>
> *Ingersoll's—Roccus, Manual of Maritime Law. Treatise on Ships and Freight,* N XL. Hopkins and Earle, Philadelphia, 1809.
>
> *Stair, Institutions of the Law of Scotland,* Lib. I, tit. XIII, 3; printed by the Heir of *Andrew Anderson,* Printer to Their Most Excellent Majesties, *Anno* D O M. 1693, Edinburgh,

and in footnote 1, p. 591, Mr. Justice Story himself says:

> "There are certainly passages in the Digest which make principals responsible for the faults and negligences of their agents and servants, beyond those specially pointed out in the Praetor's edict. *This responsibility seems, however, to have been limited to cases where the principal was guilty of some negligence in employing negligent and improper agents and servants.*" (Italics ours.)

As a general rule the only liability for the delicts of others at Roman law was noxal; their was no general principle of *respondeat superior.*

O. W. Holmes, Jr., ibid, p. 8 ff;

Buckland—A Text-book of Roman Law, p. 594, ff. Cambridge University Press, 1921.

Thus, even if *"exercitor"* were properly translated "shipmaster", we submit that the passages cited by Story do not support the proposition that a shipmaster is responsible to third parties (not passengers) for the torts of his subordinates. But Story is in further error. The *exercitor* is *not* the master of the vessel. The *exercitor* is the owner or owner *pro hac vice* of the vessel—not the shipmaster. This is clearly pointed out in the Digest.

Thus, *Ulpianus* (on the edict 28) in discussing the *exercitorian* action in connection with the rights of those who have entered into contracts with the master, says:

> "The term exercitor is understood to mean the person by whom all proceeds and payments are received, whether he is the owner of the vessel or he hired the vessel at a lump sum either for temporary use or altogether."
>
> Dig. Lib. XIV, tit. 1, 1. 15.*

*Monro—*The Digest of Justinian,* Vol. II, p. 381.

And further says:

> "People are allowed to choose whether they would like to sue the *exercitor* or the master."
>
> Dig., ibid., 17.

Likewise, *Emerigon* in his *Essays on Maritime Loans*, p. 271** states:

> "We call exercitor (a) the person who receives the freights and profits of a vessel. Whether he be himself the owner of the ship, or whether he has hired her from the owner for a time or forever,"

and in a footnote says,

> "(a) The Latin word exercitor cannot be rendered by an exactly corresponding word in our language; it answers to the French word *armateur* and means not only the actual owner of the vessel; but he who is in possession of her, whether for himself or for another; who has the care of fitting her out, and who acts as owner, though it may not be in his own right. . . ."

So, also, the passage cited by the author from *Stair's Institutes* points out the distinction between the *exercitor* and the master.

> "An *Exercitor* is he to whom the profit of vessels or ships, whether upon the Sea, Rivers or Lakes, belongeth; whether he be owner of the ship or have only hired the same; the Master of the Ship is he that hath the command thereof, who therefore may contract and borrow Money for Reparation of the Ship, or out-rigging thereof, or for the intertainment of the Mariners, or any other thing for the use of Voyage. And thereby not only the Master Con-

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**Philip H. Nicklin & Co. Baltimore, 1811.

tractor, but the *Exercitor* who constitute him is lyable."

Stair—Institutions of the Law of Scotland, Lib. I, tit. XII, Sec. 18.*

See also,

3 *Kent—Commentaries,* Sec. 161, footnote (b);
Story, ibid., Sec. 36.

Thus, Story's error is twofold. First, he assumes that the master is the *exercitor* in Roman Law; second, he assumes that the *exercitor* is liable for tortious acts of the crew. The master is not, as such, the exercitor and the liability of the exercitor (and, of course, of the master in any case in which he happens to be also exercitor) is limited to loss on the ship of goods of passengers after the manner of innkeepers and stablemen for loss of property in their custody.

There is nothing in the Roman Law cited by Story to sustain the proposition that a shipmaster is liable for a collision occurring through the negligence of one of his subordinate officers.

And when we come to examine the cases cited by Story, it will be seen that only *Denison v. Seymour* and *Foot v. Wiswall* support the statement of the text. The remaining cases involve liability arising out of contract or are cases such as *Purviance v. Angus,* 1 Dall. 180, where the master personally was at fault. This miscitation is commented upon by Willes, J., in *Blaikie v. Stembridge,* infra, where he says:

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*Story mis-cites this section as 28. There is no section 28 to this title.

> "However, upon examination of the authorities cited by the very learned author, we find that they are confined to cases of contract and of collision* (upon which latter subject the American decisions seem to have gone further than ours)."

In line with his statement concerning the Roman law, Story predicates this exceptional liability of the master principally on the ground that masters of ships, though the agents or servants of the shipowners, are treated "as in some sort a subrogated principal and qualified owner of the ship, possessing authority in the nature of the exercitorial power for the time being". We have shown, we think, that the shipmaster was not as such an *exercitor,* but merely had the power to bind the *exercitor* by his contracts.

There is, however, no doubt that in ancient times, the situation of a shipmaster was often quite different from what it is today and that he held a much more responsible position. He was often a part owner and "the head and acting partner in a commercial enterprise" (see *The Rebecca,* infra). In Chapter III of this brief we present the considerations which show we think that Story's basis for the exception is predicated on conditions no longer existent and that his premise accordingly fails. Story also says that the imposition of this personal liability on the master will tend to induce a superior watchfulness over the conduct of his subordinates; but that could be said of any middleman. Story relies on *Denison v. Seymour* and quotes extensively in a footnote

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*i. e.: *Denison v. Seymour.*

from the opinion in that case; but as we have already suggested, the decision in that case is a *non-sequitur* from the reasoning.

3. The remaining authorities are based either on *Denison v. Seymour* or *Story*, or announce the rule without reasoning or authority.

Foot v. Wiswall is in the last category. *Kennedy v. Ryall* relies on *Denison v. Seymour* and *Story*. The first Louisiana case, *Buel v. N. Y. Steamer*, relies on *Story* and on *Burke v. Clarke*, 11 La. Rep. 206. This latter case is not in point. It held that a master who was part owner was jointly and severally liable with his partner. *The City of New York*, 25 Fed. 149 (1885) is based on *Story* and apparently on that basis alone gives it as the general rule in English and American law that the master is liable for the tortious acts of his subordinates.

The Circuit Court of Appeals cited and quoted from *Wilson v. Belvidere*, 30 Fed. Cas. 106, Number 17790 (D. C. Pa. 1806) in support of their affirmance of the judgment entered against the master. This case, if good law, does not seem to us to be in point. It apparently holds that the entire personnel of the vessel must contribute, by deduction from and in proportion to, their monthly wages to make up for cargo lost by the negligence of any of them—except that those who remonstrate in advance against the negligence will not be thus required to contribute. There is no suggestion in the case of the right of any third party damaged by such negligence to sue non-negligent members of the ship's complement, nor is there any suggestion that each mem-

ber of the ship's personnel may have a judgment rendered against him for the entire loss. The language quoted by the Circuit Court of Appeals in its opinion in the case at bar should be read in context with the opinion in the *Belvidere* case. So read the above mentioned distinctions appear at once and it also becomes plain that the Pennsylvania District Court was not dealing with the question of the master's contributory liability alone but of the contributory obligation of the entire personnel of the ship, master, officers and crew included.

Examination of other texts which recognize the exception to the general rule,

Shearman & Redfield on Negligence, 6 Ed., Vol. 2, Sec. 246, p. 712;

36 *Cyc.* 150;

11 *C. J.* 1172;

Spencer on Collisions, Sec. 182;

Kay on Shipmasters and Seamen, Vol. 2, p. 1153;

discloses that they are substantially based on *Story* or the other authorities we have reviewed, or, on other cases not in point such as those involving the master's liability on contract.* For instance, Spencer cites only *The Lotty,* 15 Fed. Cas. No. 8524 (1846) in his support. In that case the master was personally negligent, in suffering his vessel to remain inadequately moored in the face of an approaching and increasing storm of which he had ample warning. *Kay on Shipmasters,* cites only one au-

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*It should be noted that cases involving the master's liability for damage to cargo where he has signed bills of lading as master and not as agent, are not in point. In such cases he makes himself personally liable in contract. See *Carver on Carriage of Goods by Sea,* Sec. 47.

thority, *Blaikie v. Stembridge* (which we discuss infra) and this case in support of the statement that the law of England is probably contrary to the statement of the text.

Thus, even were there no contrary authority, it would seem doubtful in view of the few decided cases and the courts from which they issue, whether the statements found in the texts to the effect that this is the settled law are warranted. And there is contrary authority.

B. The authorities holding the master not liable.

The two Louisiana cases above referred to are overruled, we think, by the case of

Le Blanc v. Sweet, 31 So. 766 (La.).

In this case a passenger on a steamboat was drowned in disembarking. She was attempting to get into a skiff and the officers of the vessel negligently failed to stop the vessel before allowing her to disembark. The suit for the death was brought against the owner of the vessel and also the master. The master was not personally negligent. The court relieved him from liability, saying:

> "As to the defendants, it appears that the boat belonged to Daniel E. Sweet, and that Henry L. Sweet occupied the position of master and engineer. Under these circumstances we find no reason for holding the latter liable."

The headnote of the case (by the Court) reads:

> "Where an action in damages is brought against the owner and also the master of a steamboat, and it appears that in the transaction out of which the action arose the master was acting in his representative capacity, the owner alone is liable."

To the same effect is

De Harde v. Magdalena, 24 La. Ann. 267,

where, in discussing the liability of a master, the Court said:

> "One agent ought not to be held responsible for the fault of another although the principal or owner of the vessel may be responsible for the fault of either."

The law of England is assuredly contrary. We have already adverted to the criticism of *Bowcher v. Noidstrom* by Lord Justice Best in *Hall v. Smith,* 2 Bing. 153 (p. 10, supra) and to the reference in *Kay to Blaikie v. Stembridge,* 6 C. B. N. S. 894, 141 Eng. Rep. 703 (1859).

In

Blaikie v. Stembridge

Willes, J., plainly intimates his disapproval of the statements in *Story.*

Here The Gundreda was chartered to one V. K. Gallard. The charter party provided "stevedore for outward cargo to be appointed by charterer, but to be paid by and to act under the captain's orders." The charterer appointed a stevedore who went on board and commenced loading. The captain gave no orders but contented himself with seeing that the cargo was stowed in consonance with the ship's safety. During the loading some cargo was damaged due to the stevedore's negligence and this action was brought against the captain for the loss. The captain was held not liable, the Court saying:

> "Upon these grounds, it appears to us, *that unless the plaintiffs can establish some peculiar and ex-*

ceptional rule of liability with respect to the master of a ship, the defendant is entitled to the verdict; and, indeed upon the argument, it was contended that such a rule did exist. The authorities relied upon are, however, in our opinion, inapplicable. With respect to the case of *Morse v. Slue,* 1 Vent, 238, etc., it was founded upon a contract to carry goods actually delivered to and in the custody of the master on board the ship; and he was bound, as he would have been here if a bill of lading had been given for the injured pans, to deliver the goods in the state in which he received them, except prevented by the act of God or the Queen's enemies, or other expressly excepted peril. Accordingly, in Abbott on Shipping, part 2, ch. 2 (10th edit.), p. 91, referring to *Morse v. Slue,* the law is laid down as follows: 'It is true that the master also is answerable for his own contract; for, in favor of commerce, the law will not compel the merchant to seek after the owners and sue them, although it gives him the power to do so, but leaves him a twofold remedy, against the one or the other.' Another authority relied upon was Story on Agency, Secs. 314-318, in which it is stated that the case of masters of ships is an exception to the rule previously laid down as to the nonliability of agents to third persons for the negligences and omissions of duty of themselves and their sub-agents. And it is there laid down that 'this liability founded upon the doctrine of the maritime law, which treats the master not merely as an agent contracting on his own behalf as well as for the owner; but which, upon a broader policy, treats him as, in some sort, a subrogated principal, and qualified owner of the ship, possessing authority in the nature of the exercitorial power for the time being. And his liability founded upon this consideration extends not merely to his contracts, but to his own negligence and nonfeasances and misfeasances, as well as to those of his officers and crew. His responsibility for the officers and crew has this additional reason for its

support, that he is thus induced to exercise a superior watchfulness over their acts and conduct; and, if he were not so made liable for their acts and conduct, he might often, by his connivance in their frauds, misfeasances, negligence, or nonfeasances, subject the shippers of goods, as well as the owners of the ship, to great losses and injuries, without their having any adequate redress. The policy of the maritime law has, therefore, indissolubly connected his personal responsibility with that of all the other persons on board, who are under his command, and are subjected to his authority.'

However, upon examination of the authorities cited by the very learned author, we find that they are confined to cases of contract and of collision (upon which latter subject the American decisions seem to have gone farther than ours); and, after a diligent search, we have not found any authority for the position that a person sending goods to be loaded on board a general ship is entitled to assume, without inquiry, that his goods are to be shipped and stowed by the master, rather than by a stevedore, and so, without any contract with or wrong done by the master or crew, to insist upon holding the master liable."

Here then is a square holding that there is not any general rule of peculiar and exceptional liability placed on a shipmaster as distinguished from any other intermediate servant. And we do not apprehend that it can be seriously argued that torts resulting in collision should be placed in a peculiar class of their own, with different rights and liabilities than those flowing from other torts.

In Volume 26 of *Halsbury's Laws of England*, at page 526, Section 771, on the liability of the master in the chapter on collision, reads:

"The master is liable for damage arising from his own negligence or breach of contract made with the owner of cargo shipped on his vessel; but he is not liable for the damage done by an act of the crew or of the pilot, whether done in the course of their duty to the shipowner or not, unless ordered by him."

In the chapter on Liability for Collision, the 8th Edition of *Marsden on Collisions at Sea,* page 73, opens with the following passage, citing in footnotes with obvious disapproval *Story* and *Denison v. Seymour,* supra:

"The person primarily liable in damages to the sufferer by collision is he by whose negligent act the loss was occasioned. The shipowner navigating his own vessel, the master, mate, pilot or other person in charge of the ship, who gave a wrong order to the helm, the helmsman who directed the ship's course wrongly, the seaman on the lookout who negligently failed to see and report the approach of the other vessel, may all be sued as wrongdoers, and are liable for damages.

Thus when an action was brought against a pilot on board a King's ship for injury to the plaintiff's ship by the King's ship, it was held by Lord Kenyon that, though the pilot might be obliged to act in obedience to the order of the lieutenant in command of the King's ship, yet the pilot would be liable, if the collision happened by his personal misconduct. Upon proof, however, that the collision occurred by reason of an alteration of the helm ordered by the lieutenant, the plaintiff was non-suited.

It has been said that the master is liable for the negligent and wrongful acts of his crew as well as for his own acts. His liability as carrier, unless specially limited, may extend so far, but in no reported case has he been held liable in tort for wrongful acts of the crew. For wilful injury to

another ship by pilot or crew he clearly is not liable."

In *Clancy v. Harrison* (1878) 4 Vict. L. R. 437, the Supreme Court of Victoria held that a master of a ship is not liable for injuries occasioned by the negligence of the crew. In the *Per Curiam* decision the Court said:

> "Conceding that there was evidence of actionable negligence by anyone, the defendant is not answerable for the negligence of another fellow servant, even if the owners themselves would have been liable; in any aspect there was no evidence to go to the jury."

To recapitulate: There are three cases in one state, New York, and one Federal District Court case holding a master liable under these circumstances. The authorities, in Louisiana, England and Australia are *contra.* We think it may be properly said that the statements in *Story* and the other American texts as to the law on this subject are unwarranted.

III.

EVEN IF THERE ONCE WERE A POSSIBLE BASIS FOR HOLDING A SHIPMASTER LIABLE FOR THE NEGLIGENT ACTS OF HIS SUBORDINATES, THE REASON FOR SUCH HARSH DOCTRINE HAS CEASED TO EXIST AND THE RULE SHOULD NO LONGER BE APPLIED.

A. The considerations which conceivedly may have warranted the imposition of such liability are not present under modern conditions of ship operation.

It will be noted that the principal basis for Mr. Justice Story's statement was that masters are treated "as in

some sort a subrogated principal and qualified owner of the ship, possessing authority in the nature of the exercitorial power for the time being."

Assuming that this statement was once true, it does not hold good of present day conditions. Even in Story's time it had been judicially recognized that ships were being operated under radically different arrangements. Thus in 1831 (Story's work was published in 1839) Judge Ware of the District Court of Maine in the case of

The Rebecca, 20 Fed. Cas. No. 11619,

had before him the question of whether a vessel was liable, in specie, to answer for the loss or damage, by the fault of the captain, of goods which were taken to be transported on freight. Judge Ware made an exhaustive search of the codes and ordannances of the maritime law regarding the relationship of the master of the vessel and its owners. In the course of his discussion he made the following observations directly pertinent to our problem:

> "The custom which exempted the owners from personal responsibility for the acts of the master, extended, as has been observed, as well to obligations arising ex contractu as ex delicto. No distinction was made between them, and on the principles upon which the custom stood in its origin and in the time of the Consulate of the Sea, there does not appear to be any just ground for a distinction. The master, who was, in point of fact, ordinarily, if not always, a part owner, was considered as the head and acting partner in a commercial enterprise, and not as the agent of the owners of the vessel, and merchants dealt with him and trusted him in that character. And this was the character which the maritime legis-

lation and jurisprudence of the times attributed to him. But since the age of the Consulate, a great revolution has taken place in the state of civil society, and the reasons of public policy, in which the custom originated, have, in a great measure, ceased to exist. In consequence of the increased facilities of communication between nations, the greater security of maritime commerce, the vast augmentation of commercial capital, and the elasticity and vigor communicated to maritime adventures by the invention of the contract of insurance, extensive commercial enterprises are brought within the means of individual capitalists, and the union of a number of fortunes has become unnecessary for the carrying on of commercial operations with safety and success, even upon a large scale. During the same period, a gradual and silent change has been operated in the relations of maritime commerce. *The character and authority of the master of a vessel has fallen from that of the chief and the acting and responsible head of a maritime adventure, to that of the stipendiary agent or praepositus of the owners of the vessel. This change in the character of the master, should naturally be followed by a corresponding change in his authority and liabilities.*

It is a rule of natural law, incorporated into every system of jurisprudence, that the contract of an agent, acting in the name of his principal, and within the limits of his authority, binds the principal, but does not, unless he exceeds his authority, bind himself. The contract of the agent is the contract of the principal, entered into through the medium and instrumentality of the agent. It is, therefore, directly binding upon him, as his own contract. It is also obligatory upon him on the principles of natural equity. He has the benefit of the contract, and in justice ought to bear its burden. But as the agent contracts in the name of another, and derives no personal advantage from the contract, there is no reason for holding him personally bound to fulfill its ob-

ligations. Looking upon the master of a vessel, therefore, as the simple agent of the owners, acting in their name and for their benefit, upon the plainest deductions of reason, as well as upon the principles of natural equity, his contracts, within the legitimate scope of his authority, ought to be personally binding on the owners, and, for the same reasons, they ought not to be personally obligatory upon himself. *A just application of principles to the altered relations of the master to the owners, will reverse the ancient custom as to their liabilities.*" (Italics ours.)

If the foregoing observations are true of conditions in 1831 how much more applicable they are to conditions today. It may possibly be (although we doubt it and doubt whether it ever was the law) that in earlier times, when masters of vessels were often part owners; when a vessel would leave its home port to trade in all parts of the world for several years without return, that it was proper to hold the master personally responsible for the negligence of his inferiors. But times had changed by 1831. At that time it was recognized that the master had become only the stipendiary agent of the owners of the vessel.

Today it is a matter of common knowledge that he is rarely even that. The day of the tramp steamer and trading vessel is practically gone. As a general rule vessels have regular routes and regular ports of call. This was the situation of the Newport. Steamships are owned in the main by large corporations; port captains employ the officers; officers and clerks on shore supervise the receipt and discharge of cargo and pay the bills in connection therewith. The master today is little more than a navigator.

Judge Neterer of the District Court in Washington has recently commented on the changed situation of the master of a vessel in

Everett v. U. S., 277 Fed. 256.

This was an action by seamen against the master of the vessel on which they had signed articles. The form of articles which must be signed is prescribed by Section 4612, R. S.; Schedule, Table A. Under this form the master personally contracts to pay the seamen their wages. The court deprecated the statutory necessity for holding the master liable and expressed a strong opinion relative the injustice of the situation, saying:

> "Under the shipping articles the master is obligated to pay the wages of the seamen. This is an extreme hardship, brought on by no fault of the master. It is a liability which was not contemplated by either the master or the seamen. The master lost his earnings on the voyage, he could not even participate in the proceeds of sale of the vessel, and now to be adjudged liable for the unpaid wages of the seamen will take from him all his savings, and the provision made for the education of his children, and leave his family destitute, except such exemptions as are given by law to the head of a family. The form of article is provided by section 4612, R. S., 'Schedule' 'Table A' (Comp. St. Sec. 8392). This form was adopted when the relation of the master to the ship and to the owner was very different from that of the present time. The reasons for this stipulation, it would seem, do not obtain in the modern shipping world, and a change should be made, but it cannot be made by the court."

The District Court in the foregoing case was forced to hold as it did because the statute admitted of no other decision. This court is under no such compulsion in the

present instance. No statute is involved. The few authorities (none recent) which have passed on this question are in conflict. Even if it can be said that the decisions pronouncing the old harsh doctrine are preponderant, they do not issue from courts which would warrant this court in following them for any reasons of comity or the like. Nor have any rights in property become fixed which might justify the further promulgation of an unsound and cruel rule.

And if there ever were a valid reason for the doctrine announced by *Story* and *Denison v. Seymour* we submit that it is now non-existent. The day has long since gone by when, in the words of *Story*, a master of a vessel is "a sort of a subrogated principal and qualified owner of the ship." As a master is not an owner, or a "qualified owner", we submit that the principle of *respondeat superior* should not be applied to him.

It seems to us that it would be a very harsh doctrine that would hold the modern salaried shipmaster liable for tortious acts of the subordinate ship's officers where the master himself has not been negligent. It is plainly impossible for a shipmaster to be always on the bridge, and he can never be in the engine room. If the ruling of the Circuit Court of Appeals is upheld every shipmaster is faced with the prospect of having his life's savings swept away by the negligent act of a subordinate while he is properly asleep in his cabin. His liability will be greater even than that of the shipowner inasmuch as the latter has the benefit of the Harter Act* and the

*Act of Feb. 13, 1893, Ch. 105, Sec. 3, 27 Stat. at L. 445, U. S. Comp. Stat. Ann. 1916, Sec. 8031.

limited liability statutes** and the shipmaster has not.

B. The reasons for the rule having ceased, the authorities applying it should not be followed. "Cessante ratione legis, cessat ipsa lex."

Entirely apart from the authorities recognizing the changed status of a shipmaster, it is a matter of common knowledge that a master today is merely a principal servant of the owner of the vessel. No reason exists today (if it ever existed) for making his case an exception to the general rule of non-liability of intermediate servants.

> "It is a well settled rule that the law varies with the varying reasons on which it is founded. This is expressed by the maxim, *'cessante ratione cessat ipsa lex'*. This means that no law can survive the reasons on which it is founded. It needs no statute to change it; it abrogates itself. If the reasons on which a law rests are overborne by opposing reasons, which in the progress of society gain a controlling force, the old law, though still good as an abstract principle, and good in its application to some circumstances, must cease to apply as a controlling principle to the new circumstances."
>
> *Beardsley v. Hartford*, 50 Conn. 529, 541.

It is respectfully submitted that the judgment against cross-petitioner McKinnon should be set aside and that cross-petitioners should have their costs in this Court and in both courts below.

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**R. S. 4283-4289, 9 Stat. at L. 635, R. S. 4289, 24 Stat. at L. 80, Act of June 26, 1884, C. 121 par. 18, 23 Stat. at L. 57 (U. S. Comp. Stat. Ann. 1916, Secs. 8021-8028).

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1927

Nos. 146 and 173

HENRY WILSON, F. A. WILSON, W. T. WILSON, et al.,
Petitioners,

vs.

PACIFIC MAIL STEAMSHIP COMPANY, STEAMSHIP "NEWPORT", her engines, boilers, tackle, etc., and J. McKINNON, Master of said vessel,
Respondents.

No. 146

PACIFIC MAIL STEAMSHIP COMPANY, Claimant of the Steamship "Newport", her engines, boilers, tackle, etc., and J. McKINNON, Master of said vessel,
Cross-Petitioners,

vs.

HENRY WILSON, F. A. WILSON, W. T. WILSON, et al.,
Cross-Respondents.

No. 173

BRIEF FOR CROSS-RESPONDENTS IN CAUSE NO. 173.

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Cross-Respondents.

No. 173

BRIEF FOR CROSS-RESPONDENTS IN CAUSE NO. 173.

I. THE QUESTION SUBMITTED BY CROSS-PETITIONERS FOR THE REVIEW OF THE COURT IS NOT A TRUE ISSUE OF THE INSTANT CAUSE.

Cross-petitioners submit the broad question of the legal liability of the master of a vessel for the negligent acts of a subordinate although the master be not personally negligent.

In the circumstances of this case the question is stated too broadly; for not all negligent acts of any subordinate are involved, but only the particular act of navigating the vessel, and the particular subordinate, viz., the officer to whom the master delegates her navigation on the high seas for his own convenience.

Even with this qualification we contend that the question submitted is not a true issue of the case, but is a moot question.

To present the question as a true issue, cross-petitioners have the burden of showing the following facts:

First. Absence of negligence on the part of the master.

Second. Presence of negligence on the part of the subordinate.

Third. That the alleged negligence of the subordinate constitutes the entire fault of the ship.

The record does not support these facts, or any of them. On the contrary it shows personal negligence on the part of the master; it does not show sufficiently

the presence of negligence on the part of the subordinate; and, for all that the record discloses, the fault of the ship which caused the collision may have been independent of the negligence of the subordinate, but one for which the master was responsible.

A. The Record Fails to Show That the Master Was Free From Negligence.

Cross-petitioners' pleadings admit that the *steamship "Newport"* violated three important articles of the international collision rules. (R. 31.) Her master was on board before, at, and after the collision. The prima facie presumption is, therefore, that he, as chief navigator, is responsible for the admitted negligence.

To overcome this presumption, cross-petitioners must show by a preponderance of the evidence that the admitted violations were committed without any fault on the part of the master, and that he was competent, vigilant and diligent in all respects. Does the record show these facts?

The master was called as a witness for cross-petitioners, but for the limited purpose of giving expert testimony as to alleged faults in the navigation of the other vessel. (R. 104-117.) His direct examination is silent as to what was done on board of his vessel before the collision, except to show that *he went off the bridge about twenty minutes before the collision, and that the third mate was thereafter navigating officer.* (R. 105.) The master's alleged freedom from fault is permitted to rest on the inference that the master was not at fault, because he was not on the bridge.

There is no evidence that the master's leaving the bridge, when in sight of a vessel approaching on a crossing course, throwing upon him an active and urgent responsibility, was consistent with due diligence on his part. There is no evidence that the fact that the third mate, during the crisis, was left as navigating officer, was consistent with due diligence on the part of the master; no evidence to show that the master knew the third mate to be a qualified officer; no evidence that the master, when he left the bridge, had stationed competent lookouts on watch, or a competent man at the wheel; no evidence that the master, when leaving the bridge, had given proper, or any, instructions to the officer on watch; no evidence that the master had satisfied himself of the seaworthiness of the bridge before he went below.

The record is consistent with any of the following assumptions of fact: That the master went below after he became aware of the approach of another vessel on a crossing course; that he went below without excuse or necessity; that he gave no instructions, or even wrong instructions before he went below; that he left the bridge in charge of an inexperienced and incompetent navigator, knowing him to be such; that he knew when he went below that the steering gear did not function properly; that there was an incompetent man at the wheel; that there was no lookout in position.

If the mate's navigation was in accordance with the master's instructions, the master was responsible for it; if the mate's navigation was negligent on account of failure to receive proper instructions from

the master, the master was responsible for the mate's negligence.

B. The Record Contains Affirmative Evidence of Negligence of the Master.

a. He Left the Bridge When a Vessel Approaching on a Crossing Course Was in Sight.

The master "should not leave the deck in charge of a junior officer when another vessel is approaching, so as to involve risk of collision." (Marsden, Collisions, 8th Ed., p. 451.)

The Circuit Court of Appeals found:

> "The vessels approached from converging courses and were in sight of each other from the time they were about eight miles apart. * * * There was no change of bearings from the time the vessels saw one another. The full speed of the 'Newport' was ten knots, and that of the 'Svea' seven and a half knots." (R. 239, 240.)

It was the admitted duty of the "Newport" to keep out of the way of the "Svea". To perform this duty required vigilance and a change in the navigation of the "Newport" at the proper moment. In this situation, was it proper for the navigator of this passenger vessel to leave the bridge and delegate his critical duties to a junior officer, without an excuse of the most pressing nature?

It was

> "argued by proctors for the 'Newport' that because both vessels from about 9:20 A. M. until the collision and over a distance of approximately eight miles were clearly visible to each other, and inasmuch as the bearing of the 'Newport' did not change or deviate, such facts in themselves were definite proof that the vessels would inevitably

come into collision unless one or the other modified her course or speed, * * *" (Opinion of District Court, R. 64.)

The collision occurred at 9:53. The interval between 9:20 and 9:53 is *thirty-three minutes.* The master testified that he left the bridge about 20 minutes before the collision (R. 118), say at about 9:33. From this it follows that, between 9:20 and 9:33, or *for about 13 minutes,* the vessels were clearly visible to each other. If the master, during these 13 minutes, did not see the "Svea", "clearly visible" and approaching on a crossing course, his failure to see her was negligence; if he did see her, as she approached without changing her bearing, but nevertheless left the bridge, his leaving the bridge was negligence.

There is no evidence in the record showing any excuse by the master for surrendering the navigation to any subordinate in the critical situation existing when he "left his duly licensed third officer in charge of the bridge and had gone below to his cabin some twenty minutes before the collision." (Brief for cross-petitioner, p. 3.)

b. He Delegated the Navigation, When the Danger of Collision Was Momentarily Increasing, To a Subordinate Whom He knew To Be Inexperienced and Therefore Should Have Known To Be Presumably Incompetent.

The steamer "Newport" "was an iron vessel, heavy loaded, carried a large number of passengers and a large crew." (Claimant's answer, R. 32.)

What is the duty of a master of such a vessel, *assuming* that he had a proper excuse for leaving her bridge in the situation above described?

His duty is clearly, to place in charge of the navigation an officer whom he knew to be experienced and competent to handle the exacting situation then existing, and to give him proper instructions before going below.

The record contains no evidence to show that the third mate who was left on the bridge was either experienced or competent, but indicates by inference that he possessed neither of those qualifications; it also shows by inference that the master left his post without giving any instructions of any nature; and it shows directly that the master's selection of his delegate for the navigation was grossly negligent under the circumstances.

The following testimony appeared on his cross-examination:

> "Q. You gave some instructions to your officers about standing watch on the bridge, did you not?
>
> A. *This young man was just keeping his first watch on ship; he just shipped the day before, and was making his first voyage.*" (R. 118.)

The inference from this testimony is that either the master went below without leaving any instructions, or he does not care to disclose what were the instructions given to the inexperienced young man. In either case a finding of negligence would be justified. But clearly the delegation of the duty to navigate the passenger vessel, while approaching a critical and exacting situation, to a young man of the description given by the master is negligence *per se*.

It should also be noted that, if any inferences deducible from the omission of testimony in this case do not correspond with the facts as they actually occurred, cross-petitioners had the means of showing the facts; for both master and third mate were on the witness stand, but cross-petitioners considered it more helpful to their case to take the position that

> "There is no need of discussing or going into what she was doing at all." (R. 101.)

We submit that, in order to raise an issue predicated upon the diligence of the master, it was necessary for cross-petitioners to go into what the vessel, her master, her third mate, her lookout, if any, her helmsman and others were doing during the critical half hour before the collision.

C. The Record Fails to Identify the Admitted Fault of the Ship With Any Negligence of the Subordinate.

a. The Record Does Not Show Any Specific Negligence of the Third Mate.

He was the navigating officer during the last twenty minutes before the collision. His testimony was available to cross-petitioners (R. 147-148); but cross-petitioners preferred not to examine him. A proper inference is that his testimony would have been harmful to cross-petitioners' case. The court is invited to infer his personal negligence from a blanket admission that the ship was negligent in her navigation, and the fact that he was left on the bridge for twenty minutes. If he received instructions from the master to go ahead and cross the bow of the approaching "Svea", it cannot be said that he was personally negligent; if he

gave the proper orders to avoid the "Svea", but the steering gear or the telegraph of the "Newport" were out of order, he was not personally negligent. Either of the suggested eventualities are consistent with an admission of fault by the "Newport" and the absence of evidence as to what happened on the bridge.

b. Assuming Negligence on the Part of the Third Mate, There is no Evidence That Such Negligence Was the Collision Cause for Which Cross-Petitioners Admit Partial Responsibility.

The fault of the ship may have consisted of the mate's negligence *plus other faults for which the master is responsible.* If this assumption is wrong, cross-petitioners had the means to prove its incorrectness by producing the master, his third mate and quartermasters (R. 120-1), but preferred to leave it doubtful whether there was any one on the bridge of the "Newport" immediately before the collision. (R. 101.) One instance of another possible fault than the suggested negligence of the mate, a fault which is consistent with the record as it stands, and for which the master would be responsible, is: That the master, before leaving the bridge, gave wrong instructions to the mate, rules or no rules. That he has more respect for his own opinions than for rules or regulations is proved by his own admission when he testified as an expert navigator against the "Svea":

> "When they get within a half a mile they ought to do something, *notwithstanding any rules or regulations of what a man has to do.*" (R. 117.)

D. The Courts Below Have Made No Finding That the Evidence Absolves the Master From Personal Negligence.

In the opinion of the District Court (R. 63-8) the question of the master's liability was not discussed, but the decree was against "the steamship 'Newport', her engines, boilers, tackle, etc., George McKinnon, master of said vessel, and Pacific Mail Steamship Company, a corporation."

The Circuit Court of Appeals affirmed that part of the decree making Captain McKinnon personally liable. (R. 249.) The court, however, made no reference to the evidence bearing upon the question of the master's personal negligence, nor did it make any finding.

Referring to cross-petitioners' contention that the decree holding the master of the "Newport" personally liable is erroneous, the Circuit Court of Appeals said:

> "ACCEPT IT that the evidence excuses the master from personal negligence and the question is, should he be held responsible for the negligence of his subordinate officer, * * *" (R. 244.)

II. CROSS-PETITIONERS' PETITION HAVING BEEN PRESENTED ON A MOOT QUESTION, THE WRIT OF CERTIORARI WAS IMPROVIDENTLY GRANTED, AND SHOULD BE DISMISSED.

Cross-petitioners' application was presented on "the issue of the individual liability of the master for the negligence of a subordinate." (Cross-petition, p. 2.) If the court is satisfied with our showing that this is not an issue arising under the facts of this case, but is an issue erroneously injected into it by cross-peti-

tioners, the writ of certiorari was granted under a misapprehension and should be dismissed.

In *Furness, Withy & Co. v. Yang-Tsze Ins. Ass'n,* 242 U. S. 430, the court held that whenever in the progress of the cause facts develop which if disclosed on the application would have induced a refusal, the court may dismiss the writ.

See also *Southern Power Co. v. North Carolina Public Service Co.,* 263 U. S. 508.

The instant case is one where these principles should be applied and cross-petitioners' writ be dismissed.

III. THE MASTER OF A SHIP IS LEGALLY LIABLE FOR THE NEGLIGENCE OF A SUBORDINATE TO WHOM HE DELEGATES THE FUNCTION OF NAVIGATING THE SHIP ON THE HIGH SEAS.

The question submitted to the court is confined to the responsibility of the shipmaster for the negligence of a subordinate to whom the master has delegated his principal function on the high seas, viz., the navigation of the ship. This question was not put in issue in the District Court, but was raised by cross-petitioners for the first time on appeal to the Circuit Court of Appeals, which *assumed* that the evidence absolved the master from personal negligence. Inferentially it was also assumed by that court that it was not negligence in the master to leave the bridge in charge of the third mate after a vessel, plainly visible, had been approaching for thirteen minutes on a crossing course.

The principle upon which the question depends is not so much whether the actual negligence is that of the master personally, or that of a subordinate. The principle is, in the language of this court in *The China,* 7 Wall. 53, 69:

> "Whether the party charged is liable or not, aside from the merits, depends in all cases upon *his relations to the wrongdoer.* If the wrongful act was done by himself, or was occasioned by his negligence, of course he is liable, and *he is equally so, if the act constituting the fault was done by one towards whom he bore the relation of principal,* * * *" *

Off-hand it would seem clear that not only in fact, but also on principle, and in the law, the master, and not the owner, is the principal in the navigation of the vessel on the high sea, and that the mate whom the master places in temporary charge of the navigation is the master's agent. Furthermore, there are potent reasons of policy why the responsibility for the proper navigation of the ship should at all times rest upon the master. This court has several times expressed its opinion on this question, always directly contrary to cross-petitioners' present contention.

A. The Cases in This Court and Federal Courts.

In *The China,* 7 Wall. 53, 68, the court said:

> "The maritime law as to the position and powers of the master, and the responsibility of the vessel, is not derived from the civil law of master and servant, nor from the common law.

*Italics ours.

It had its source in the commercial usages and jurisprudence of the middle ages."

In *The Atlas*, 93 U. S. 302, 311, the court said:

"Beyond all doubt, the owners of a ship or vessel injured by collision may proceed to recover compensation either against the owners, or against the master personally, or against the ship herself, at their election. *The Volant*, 1 W. Rob. 387; Maude & P. on Ship. (3d ed.) 466.

Argument to support that proposition is unnecessary, * * *"

In *Homer Ramsdell Co. v. Comp. Gen. Trans.*, 182 U. S. 406, 416, the court, speaking by Mr. Justice Gray, cited approvingly the following statement by Mr. Justice Story in his Treatise on Agency, (2d ed.) Sec. 456a.

"*The master* of a ship, and the owner also, is liable for any injury done by the negligence of the crew employed in the ship. The same doctrine will apply to the case of a pilot, employed by the master or owner, by whose negligence any injury happens to a third person or his property; as, for example, by a collision with another ship, occasioned by his negligence."

It may be argued that these are dicta of the court in the cases cited; but, if correct, they are decisive of the present question. We believe them to be in line with principle, with public policy, and the authorities elsewhere. If the master is liable for injuries done by the negligence of a pilot, *a fortiori* he is liable for injuries done by the negligence of a mate.

In *U. S. v. Farnham*, 25 Fed. Cas. No. 15,071, the question was:

> "Was it the duty of the master to see to the state of the boiler, or that proper precautions were taken to relieve it from the pressure of steam when the boat was running or had stopped, or did that duty belong exclusively to the engineer?" (p. 1044.)

Judge Betts instructed the jury as follows:

> "The master is commander-in-chief. The law entrusts him with the control of the vessel and of every department of service on board; and the engineer has no more right to refuse obedience to his orders than has the mate. The captain is charged with responsibility for the right performance of all duties which appertain to the command and management of the propelling power of the vessel. *If there be misconduct or neglect in the engineer's department, the captain is, by the maritime law, responsible civilly,* and, by this statute, criminally for the consequences. * * * the master has supreme command in all respects, in directing the navigation of the boat, * * * He is responsible for every misuse or neglect of that authority, * * * if he omits to interpose and suppress the danger. He is bound to see that all persons under his command do their duty properly; * * *" (25 Fed. Cas., 1044-45.)

If this principle is correct in cases of negligence in the engineer's department, *a fortiori* in a case of negligence in navigation, the master's principal function.

In *The City of New York,* 25 Fed. 149, 151-2, a collision case, Judge Addison Brown said:

> "In modern maritime law, so far as I can discover, the liability for injuries through negligence is confined to the owners of the ship *and to the master, who is responsible for all his subordinates that are appointed by him and are under*

his control (Story, Ag. 314, 317), *and that is the general rule in English and American law.* * * * By the English and American maritime law the master is responsible for the loss of cargo equally with the owners, without reference to any personal fault of his own, but by reason of his accountability for the acts or omissions of his subordinates, *as a kind of subrogated principal,* says Story, and qualified owner."

In *The Lotty,* 15 Fed. Cas. No. 8,524, it was held that the master of a vessel is responsible for the negligence of a licensed pilot in securing her improperly to the wharf. Judge Betts said:

> "No law or port regulation has been shown subjecting the master to the authority of the pilot in respect to the position or fastenings of his vessel after she is brought into port, and consequently the *master,* equally with his owners, is *responsible for damages occasioned through ignorance, negligence or want of due precatuion in the pilot* in this service." (15 Fed. Cas. p. 934.)

In *Wilson v. The Belvidere,* 30 Fed. Cas. No. 17,790, the court, referring to the relative duties of master and mate, said:

> "He (the mate) must exercise a general superintendence under the master, over the whole business; and if any special directions are given, he must obey them; where none are given, he must use common care and discretion, according to the best of his judgment; *but he is not solely answerable for casualties.* Masters often attempt to fix the sole responsibility on mates, to screen themselves, who, of all others, should constantly exercise the most care, and marked attention. *If their engagements in other duties, or their avocations, throw on the mates the executive duties, they being (though approved by the owners) selected by the masters, and their deputies, the masters must*

> *share responsibilities when casualities occur."* (30 Fed. Cas. p. 107.)

This language applies with particular force where, as in the instant case, the master expressly delegated to the mate the function of navigating the vessel. In navigational matters the master has a unique responsibility, even greater than the owner; he is not, as cross-petitioners argue, a mere "intermediate servant."

In *Workman v. New York City, Mayor, etc.,* 179 U. S. 552, libelant, owner of the barkentine "Linda Park", injured in collision with a fireboat owned by New York City, sued *in personam* the mayor, the fire department of New York, and one Gallagher, captain of the fireboat.

The district judge held that "the running into the Linda Park arose through lack of reasonable prudence, and was unnecessary and negligent." (179 U. S. 555.)

The Circuit Court of Appeals, affirming the decree against Gallagher, said:

> "The evidence in the record adequately supports the conclusion of the court below that the injuries caused to the libelant's vessel by the impact of the fireboat were caused by *the negligent management of the fireboat* while the latter was trying to reach a convenient location to play upon a burning building near the pier at which the libelant's vessel was moored." (179 U. S. 555.)

This court said:

> "There is no substantial controversy raised on the record as to the premise of fact upon which

> *the personal decree against Gallagher* was rendered by both the courts below. * * * It is clear that if it was seriously claimed that both the courts below had manifestly erred in their appreciation of the facts as to *negligence in the management of the fireboat*, the testimony would not justify the assertion." (179 U. S. 555.)

From this case it would appear, therefore, that *negligence in the management of the colliding ship* is a sufficient legal basis for a personal decree against her master, and that the personal negligence of the master is not a necessary factor; for no personal negligence of the captain appears in the record of this case.

The brief for cross-petitioners refers to only two of the foregoing cases, viz., *The City of New York*, and *Wilson v. The Belvidere.*

Referring to the former case, cross-petitioners say:

> "The City of New York, 25 Fed. 149 (1885) is based on *Story* and apparently on that basis alone gives it as the general rule in English and American law that the master is liable for the tortious acts of his subordinates." (Brief for cross-petitioners, p. 18.)

In the case cited "the master was below, and was not in any personal fault." (25 Fed. 151.)

In *Wilson v. The Belvidere* the langauge cited above was used by the court incidental to "inquiries into the appropriate and respective duty" of the master and mate of a vessel.

B. Admiralty Rule 14.

The liability of the master in question, and the corresponding right of third parties injured by negligence in collision cases, is recognized by this court in the "Admiralty Rules of Practice, promulgated December 6, 1920. By Rule 14, (254 U. S. 685) the libelant may proceed in all suits for damage by collision, *in rem* against the ship and/or *in personam against the master* and/or the owner."

C. Other American Cases.

In *Martin v. Farnsworth,* 33 N. Y. Super. Court 246; 41 How. Pr. 59, the court, discussing the responsibilities of master and pilot, said:

> "In one of the oldest treaties (treatises) upon maritime law, a copy of which is to be found in the appendix to second volume of Peter's Admiralty Decisions, the power and responsibility of a master of a vessel are thus defined:
>
> " 'A master of a ship is one who for his knowledge in navigation and for his fidelity and discretion hath the government of the ship committed to his care and management.
>
> " 'The law looks upon him as the officer who must render and give an account for the whole charge, when once committed to his care and custody, and if misfortunes happen through negligence, wilfulness, or ignorance, of himself *or his mariners,* he must be responsible.' " (33 N. Y. Super. Ct. 260-1.)

In *Denison v. Seymour,* 9 Wend. (N. Y.) 11, the master was sued for damages arising out of a *collision which occurred while the master was below.* The ves-

sel was in charge of a pilot employed by the owners. The court said:

"Were this action against the master of a vessel engaged in the merchant service, it seems to be *conceded by all the cases that he would be liable.* In such cases, *the master is responsible for the diligence of all to whom is entrusted the management of the vessel.* * * * A steamboat for the transportation of passengers with their baggage, and for carrying small freight, *is* a merchant vessel; and *though the pilots are appointed by the owners, and not by the captain,* yet the captain is a volunteer in that service, in the language of Lord Ellenborough. The steamboat service is not like the naval service of a nation. No captain is bound to engage as such; he has a choice whether he will serve such persons as the owners choose to put on board as officers. He knows the responsibility of master of a vessel, and if he is unwilling to be responsible for the negligence of the subordinate officers, he is under no compulsion to serve there himself. If he accepts the office of master of the vessel he does so with the knowledge of the responsibility which as such he incurs. If the owner of a merchant ship were to stipulate with the master that he should take certain persons for his mates, that, I apprehend, would not alter his responsibility to third persons, however it might affect his responsibility to the owner.

"On the whole, I am of opinion that the fact of the pilot being chosen by the owners does not alter the law as to the captain's responsibility. Suppose the owners should contract, not only with the pilots, but with all the hands on board, through the agency of some other person besides the captain, as they probably do, would the captain therefore become entirely irresponsible? and must any one whose vessel has been run down, where a totally irresponsible person was at the wheel, bring his suit against a common sailor? The owners of a vessel may not be known; they

> may be residents of a foreign country. It would be adding insult to injury to say to a man, whose property had been destroyed, that he has his remedy against a common sailor, or the owners who perhaps live in Europe. My opinion is, that the master of a steam-boat is liable like the master of a merchant ship; and that the circumstance of the pilot's being appointed by the owners does not discharge that liability, so far as third persons are concerned." (9 Wendell, pp. 12, 16-17.)

In *Kennedy v. Ryall,* 67 N. Y. 379, the master was sued for damages for the death of a passenger who was poisoned while the vessel was being fumigated by the health authorities. The negligence charged was the failure of the steward of the vessel to remove the poison used from the steerage. The court said:

> "The question how far a master of a vessel is answerable for damages arising by reason of the negligence of those employed under him, lies at the foundation of this action.
>
> * * * * * * * *
>
> "By a *rule peculiar to the mercantile law, the master is liable for the negligent acts of an employe,* while engaged under his authority, to the same extent as if he were the ultimate principal, who is ordinarily bound to respond in damages for such negligence. (Shear & Redfield on Neg., Sec. 113.)" (67 N. Y. p. 382.)

Cross-petitioners admit that the following authorities also hold the master liable, although free from fault:

Foot v. Wiswall, 14 Johns. 304;
Buel v. New York Steamer, 17 La. Rep. 541;
Daret v. Gray, 12 La. Ann. 394.

It is true that there are few decided cases, but this is not astonishing with reference to a question which this court, in *The Atlas,* supra, considered settled *"beyond all doubt",* when applied to injuries by collision.

D. The Text Writers.

The rule is stated in *Cyc.* as follows:

> "The captain or master of a vessel has control of every department of service on board, and it is *his duty personally to see to the course of his vessel, and to see that the officers and crew under him properly perform their assigned duties in respect to the navigation of the vessel,* even in local waters where the vessel for the time being is in charge of a local pilot, *and if there is any misconduct or neglect he is responsible civilly,* and under some statutes criminally, for the consequences." (36 *Cyc.* 132.)

And again:

> "The master of a vessel is ordinarily liable for the acts of all persons under, or supposed to be under, his command while engaged about their ordinary duties as subordinate officers of the vessel, or as seamen." (36 *Cyc.* 150.)

In 11 *C. J.* 1172 (*"Collision"*) the rule is stated as follows:

> "Provided he is in actual command at the time of the collision, * * * the master of a vessel is liable for damages."

Story on Agency, 7th ed., sec. 313, extensively discussed with disapproval in brief for cross-petitioners.

Curtis, Rights and Duties of Merchant Seamen:

> "The master is personally liable for his own negligences, non-feasances and misfeasances. *He*

is also liable for those of his officers and crew, though no personal fault or negligence is imputable to him. The rigor of the law in this respect arises from *reasons of public policy,* and does not admit of any distinction whether the officers and crew are appointed by the master himself, or by the owner." (pp. 204-5.)

Spencer, Marine Collisions:

"The party injured by collision may not only look to the vessel inflicting the damages to the extent of its actual value, and to its owners to the extent of their interest in the vessel, but he may hold the master of the vessel liable. *The master is not only responsible for his own conduct, but also for the acts of his crew."* (Sec. 182.)

"He is the personal representative of the owners, and in their stead has authority to obligate the ship and *is personally responsible for its navigation."* (Sec. 184.)

"The master of a vessel, when in command and directing its movements, is treated as a vice-principal of the owner." (Sec. 184.)

Sherman & Redfield, Negligence, 6th ed.:

"The master of a private ship is responsible to third persons for his own negligence to the fullest extent *and for the negligence of all employed on board to the same extent as if he were the ultimate principal."* (p. 246.)

Desty, Shipping and Admiralty:

"He, (the master) is liable to third persons for acts or negligence of persons employed in the navigation of the vessel." (p. 119.)

Kay on Shipmasters and Seamen:

This leading English writer says, with reference to the point made by cross-petitioners, that the action for negligence should be brought, either against the

principal, or against the immediate actor in the wrong:

> "Masters of ships, however, form an important exception to this rule.
>
> "Although they are the agents, or servants of the ship owners, they are also, in many respects, deemed to be responsible as *principals,* to third persons, not only for their own negligences, nonfeasances and misfeasances, but also *for the negligences, nonfeasances and misfeasances of the subordinate officers and others* employed by and under them." (Citing *Story on Agency,* 314.) (Vol. 2, pp. 1153-4.)
>
> "So, if the pilot leaves the deck for a few minutes, having given directions to the second mate for the sailing of the ship during his absence, and a collision takes place through the default of the mate, and the pilot returns before the collision takes place, but too late to prevent it, *the master* and owners are liable." (Vol. 2, p. 791.)

This author states that this rule is supported by two independent reasons: First, the doctrine of the maritime law which treats the master as an "inferior principal"; and, second, public policy:

> "This liability is founded upon the doctrine of the maritime law, which treats the master, not merely as an agent, * * * but also in some sort, as an *inferior principal* and as a *qualified owner* of the ship, possessing for the time the *executive power.*
>
> "And his liability * * * extends * * * to his own negligences, nonfeasances and misfeasances, *and to those of his officers and crew.*
>
> "This great responsibility has also this reason for its support; it induces the master to exercise greater watchfulness over the acts and conduct of the officers and crew. If he were not so liable,

he might often, by his connivance in their frauds, misfeasances, negligences or nonfeasances, subject the shippers of goods, as well as the owners of the ship, to great losses and injuries, without their having any adequate redress. The policy of the maritime law has therefore indissolubly connected the master's personal responsibility with that of all the other persons on board, who are under his command and are subjected to his authority." (Vol. 2, p. 1154.)

E. The Question in English Law.

In spite of the statements in *Kay*, the leading text on the subject in England, cross-petitioners state: "The law of England is assuredly contrary."

But this is an error. In *Maude & Pollock, Merchant Shipping* (4th ed.) the distinguished author states:

> "As the master is not merely an ordinary agent, but to some extent, and for some purpose, the owner of the ship for the time being, his acts not only bind his principal, as those of an ordinary agent, but he is personally bound by them. * * * *He is also usually liable for all acts of negligence or misfeasance on the part of the crew,* by which the cargo or the property of others is injured. But he is not liable for trespasses committed by them wilfully, or for acts done beyond the scope of their ordinary employment; nor does the ordinary rule with reference to the master's liability apply to the captain of a Queen's ship, who has no power of selecting his officers and crew." (p. 154.)
>
> "To this general statement of the duties of the mariners it must be added that they are, in many senses, as has been said by Molloy, '*the servants of the master, for whose miscarriages he must answer,* and whom he may correct as the usage is at sea'." (p. 178.)

The Pilotage Act of 1913 (2 and 3 Geo. 5, C. 31; *Maclachlan, Merchant Shipping,* 6th ed. p. 211) provides as follows:

> 15 (1) "Notwithstanding anything in any public or local Act, the owner *or master* of a vessel navigating under circumstances in which pilotage is compulsory shall be answerable for any loss or damage caused by the vessel *or by any fault of the navigation of the vessel* in the same manner as he would if pilotage were not compulsory."

The passage cited in cross-petitioners' brief (p. 24) from *Halsbury's Laws of England* does not support cross-petitioners' contention. Granting that the master "is not liable for the damage done by an act of the crew or of the pilot * * * *unless ordered by him*", the act of the third mate in the instant case, which caused the collision, was an act ordered by the master, viz., the navigation of the "Newport".

In *Nicholson v. Mouncey,* 15 East. 384 (1812) Lord Ellenborough held that the master of a merchant ship is answerable for those whom he employs for injuries done by them to others within the scope of their employment.

The Australian case of *Clancy v. Harrison,* 4 Vict. L. R. 437 (1878), cited by cross-petitioners (Brief p. 25) was one where the ship was not being navigated, but was moored and the crew were painting the yards. While so engaged, one of the crew dropped a piece of iron on plaintiff, and the court held that the master was not liable for plaintiff's injury. It is not the case of a crew at sea. The negligent member of the crew was not engaged in doing the master's work, nor even engaged in a maritime occupation.

Had cross-petitioners extended their search one year beyond the *Clancy* case, the discovery would have been made that in a *collision* case arising in the same jurisdiction the Supreme Court of Victoria said:

> "So in cases of *collision,* it is necessary that the *master* should guide and control the ship; and if the *ship* is improperly controlled and guided, or unskilfully handled, and any one thereby injured, *the master is liable.*"
>
> *Stacpoole v. Belridge,* 5 Vict. L. R. 302 (1879).

The extent to which the liability of the master for acts of subordinates has been carried in English courts is illustrated by the case of *Howman v. Angus,* 1897, 25 R. (J.) 8; 35 Sc. L. Rep. 29. There a local law forbade the moving into the district of any horse, except on production of a veterinary inspector certifying that each horse was not affected with strangles. Ponies were landed from a ship in contravention of the law, the discharge being made by the *mate.* It was argued before the court that the landing was the duty of the mate, and that the captain was not responsible. But the court held, that the *master* was responsible for the act of the mate in landing the ponies without production of a certificate from a veterinary surgeon that they were free from disease. Lord Traynor said:

> "I have no doubt whatever that the offense was committed by the captain of the vessel. The captain is not in the ordinary sense the man who receives cargo or unloads it. That is generally the mate's duty. *But the mate acts only as the subordinate of the captain, and the captain is responsible for all that is done in loading or unloading or navigating the vessel.*"

F. There Are No Authorities Holding the Master Not Liable.

Cross-petitioners state:

> "There are three cases in one state, New York, and one Federal District Court case holding a master liable." (Brief for Cross-Petitioners, p. 25.)

We have shown above that the weight of authority in favor of our contention is far greater than is admitted or realized by cross-petitioners.

Cross-petitioners then state:

> "The authorities in Louisiana, England and Australia are contra," (p. 25)

and attempt proof of this statement on pages 20-25 of their brief.

Examination of the "authorities" cited will show that cross-petitioners are in error; that, on the contrary, there is no authority in Louisiana, England or Australia which fairly supports their contention.

Cross-petitioners admit that two Louisiana cases, cited by them on page 8 of their brief, hold the master liable, but contend that "the two Louisiana cases above referred to are overruled, we think, by the case of *Le Blanc v. Sweet,* 31 So. 766 (La.)". (Brief p. 20.)

That the latter case, however, does not intend to overrule the preceding cases follows from the following facts:

1. The preceding cases are not even mentioned. If the court had had any intention to reverse an established rule of law, it would certainly have discussed the former cases supporting the rule.

2. It does not appear that the question of the legal liability of the master as such was an issue in the case.

3. The facts show that the party sued and referred to in the words: "Under these circumstances we find no reason for holding the latter liable" was in the engine-room of the river boat, obeying the signals of the pilot directing the navigation from the deck. He was not the principal in the navigation, and did not act as master.

In the other case cited by cross-petitioners, *De Harde v. Magdalena* (Brief, p. 21) the vessel was under command of the harbor master; the master sued was not even on board.

It is quite safe to say that the law of Louisiana, making the chief navigator of a vessel liable for the negligence of subordinates in the navigation, remains unchanged.

Cross-petitioners' effort to show that the law of England "is assuredly contrary" is equally unsuccessful. Reliance is placed upon *Blaikie v. Stembridge,* discussed on pages 21-23 of the brief.

In that case the question is, whether the master of a ship is liable for the negligence of a stevedore appointed by the *charterer.* Of course the master was held to be not liable. The stevedore is an independent contractor, in a different position from that of a subordinate to whom the navigation of the ship is delegated. The court simply refused to hold the master liable "without any wrong done by the master OR CREW". The case is impliedly an authority supporting our contention that, *if* there is a wrong done to a

third party by the *crew,* the master would be held liable under the English law.

This case, as the ones previously cited, show the error of cross-petitioners in claiming that the authorities in England are contra to our contention. We may here recall that the Supreme Court, in *The Atlas,* supra, cited English authorities to support the rule settled "beyond all doubt".

We have already shown supra that the law of Australia, in collision cases, is in favor of our contention.

G. Cross-Petitioners' Strictures on Judge Story and the Case of Denison v. Seymour Are Unwarranted.

The long discussion involving the responsibility of innkeepers, stablekeepers and other custodians of property, in the Roman and common law, is out of place and it would not be profitable to show that cross-petitioners may be mistaken in their criticisms of Judge Story's imperfect deductions from Justinian and other ancient texts.

Judge Story is certainly correct in stating that the "exception to the general rule" referred to on page 10 of cross-petitioners' brief *is adopted in the general jurisprudence of the modern commercial nations of continental Europe,* and that is sufficient. The addition: "it having been derived from the same common source—the Roman law" may be incorrect, if by Roman law is understood "the Digest of Justinian". However we believe the addition to be correct in its wider sense.

When the emperor Antoninus was petitioned by a shipwrecked subject, he answered: "I am, it is true, the sovereign of the world, but the law is the sovereign of the sea; let this matter be determined by the Rhodian *maritime* law * * *" (Roccus, Maritime Law, preface IX; page 49, footnote.)

In *Roccus' Manual on Maritime Law* it is stated (p. 57):

> "Note LIX. The master is culpable if he commit the care of the ship to improper hands. If the vessel and cargo therefore perish, or the goods are lost from the incapacity of the crew, because the mariners were unskilful and inexperienced, *the master is always liable;* for he ought to be careful in the choice of sailors, or he will be responsible himself."

In *Brown's Civil and Admiralty Law* (1st American Edition 1840), Vol. II, it is stated (pp. 133-4):

> "The master of a ship doth not, by being constituted master, acquire any property therein, either general or special; he is only considered as an officer, who must render and give an account for the whole charge, when once committed to his care and custody; and upon failure to render satisfaction; and, therefore, if misfortunes happen, if they be either through negligence, wilfulness, or ignorance of himself *or his mariners,* he must be responsible."

The cases cited by Story are *Denison v. Seymour* and *Foot v. Wiswall.* Cross-petitioners admit that they "support the statement of the text" in Story on Agency. This would be sufficient to make the text authoritative, provided that these cases lay down the correct rule of law. Cross-petitioners do not appar-

ently deny that it *was* the rule at the time. The court said:

> "It seems to be conceded by all the cases that he would be liable." (*Denison v. Seymour,* supra.)

But cross-petitioners argue that the rule should be changed because the reason given for it in the *Denison* case is fallacious.

We submit that even if it were true that the court, in the *Denison* case, had assigned a specific reason for the rule, which reason may be fallacious, that fact would not be sufficient to require a new rule, provided the rule is supported by some good reason. It would extend this brief unduly to discuss the potency of all the reasons which could be invoked to defend the rule. We think the simple reason of *public policy,* frequently given by courts sustaining the rule, quite sufficient for its support. When the cases cited by us were decided, it was good public policy to consider the shipmaster the principal in the navigation of the ship, and therefore responsible to third parties for all navigational acts and omissions, whether they were committed by him personally or by those to whom he delegated his duty as chief in the navigation. We shall show that under modern conditions a wise public requires this rule to be maintained *a fortiori.*

H. The Reason for the Rule That the Shipmaster is Liable for The Negligence of a Subordinate Navigator of the Vessel on the High Seas Has Not Ceased to Exist, But is Stronger Under Modern Conditions.

Cross-petitioners argue that the considerations which warranted the imposition of the liability in question are not present under modern conditions of ship operation, and that consequently the authorities applying the rule should not be followed.

This argument is based upon an attempted showing that the modern master has become a mere stipendiary agent of the owners, whereas formerly he was "the chief and the acting and responsible head of a maritime adventure"; that this fall of the shipmaster from his high estate was recognized by Judge Ware in *The Rebecca* (20 Fed. Cas. No. 11,619), in 1831, even before Judge Story wrote his classical work on Agency in 1839; that Judge Story was therefore remiss in overlooking so significant a change, which should reverse the ancient rule.

An examination of the *Rebecca* case will disclose, however, that the extract from Judge Ware's opinion cited and relied upon by cross-petitioners applies to the shipmaster's liability *ex contractu*, and not to the liability here in issue, viz., the liability of the master *ex delicto*. Following immediately after the extract cited by cross-petitioners is a discussion by Judge Ware of the liability of the shipowner for the tortious acts of the master. Certainly this discussion is more enlightening than the utterly irrelevant statement cited. We quote:

> "Another principle, equally universal, is, that no one is responsible for the wrong done by an-

other, unless he is particeps delicti. *A person participates in the act when he authorizes or commands it to be done.* He may also be said to participate in the act *when it is done by one who is subject to his authority, and whose actions it is his right and duty to control;* as a parent or master is responsible for the wrongful acts of his children or servants, when he has the power of preventing them, and does not. He having the right and the power, and the law imposing it upon him as duty, he is justly considered as *authorizing the wrong which he does not prevent.* Faults, like crimes, are in their own nature personal, and are not imputable except to the person who commits them, and upon the principles of natural law the fault of one person can never be imputed to another unless he was under an obligation to prevent it. *But the positive jurisprudence of all countries extends this vicarious responsibility, upon principles of public policy, further than is strictly warranted by the precepts of natural law.* And the doctrine is stated by elementary writers, that *the principal is responsible generally for the wrongful acts of the agent, done in the execution of the proper business of the agency.*" (20 Fed. Cas. p. 380.)

Applying the principles to the instant case, it follows that the master participates in the act of navigation when he authorizes or commands the mate to navigate the vessel. The act of navigation is then performed by one who is subject to the master's authority, and whose actions it is the right and duty of the master to control. If the mate is negligent, the master authorizes the negligence which he does not prevent. The positive jurisprudence of all countries extends this vicarious responsibility of the master upon *principles of public policy* further than may be strictly warranted by principles of natural law. The

master, being the principal in the navigation is responsible for the wrongful acts of the mate, the agent to whom he delegates the navigation, while done in the execution of the business of navigating.

It is absurd to think of the master as a "stipendiary agent" relative to *navigation*. Hence all the deduction based upon the master's character as a stipendiary agent, while they may be proper in some contractual affairs, cannot properly apply to negligent navigation.

Cross-petitioners' contention that "the master today is little more than a navigator" (Brief p. 28) seems to us inconsistent with the other contention that he is a "stipendiary agent"; but accepting it that he is little more than a navigator, he still holds a powerful and responsible position while navigating on the high seas. The safety of the ship, her cargo, her passengers, and the safety of other ships, cargoes and lives depend upon his judgment and diligence. His responsibility as director of the navigation, his power to do harm, is far greater now that ships are costlier, larger and more numerous than it ever was. His responsibility for the proper navigation is exclusive of that of the owner of the ship; for the latter knows that if he interferes with the navigation he loses, in case of accident, the benefit of valuable legislation, such as the Limitation of Liability Acts, and the Harter Act. He is the principal in the navigation, the "superior", and it is meet that he should be burdened with the obligation implied in the word "respondent". He controls the movements of the modern steamship on the high seas more exclusively than the conductor controls the train on land; for the latter divides the

control with the engineer, whereas the engineer of the steamship executes in the engine-room the commands of the master from the bridge. The shipmaster has the right to command the movements of the ship and to control the persons employed upon it; he is not merely a fellow servant with the other employees, or an intermediate servant, in the navigation, but the principal. The imposition of a responsibility commensurate with his power and corresponding inability to unload the responsibility upon the shoulders of subordinates will not only insure greater care in the selection of shipmasters, but will also insure greater diligence in the performance of their duties. The consequence will be that it will give greater security to the owner of the ship, to the crew, to the cargoes carried in her, to the lives of her passengers, and to other ships, properties and lives moving upon the high sea.

It could not be claimed seriously that a rule having such a result is harsh, or unjust, or not consonant with natural law and sound public policy.

The fact that the enactments of other maritime nations make shipmasters liable for the tortious acts and for the omissions of their subordinates has a bearing upon the question, whether there is a sound public reason for the doctrine that the shipmaster is liable for the negligent, and other tortious acts of his subordinates; we therefore subjoin a few of these enactments:

The law of *France* makes the master liable for the faults of the crew. (Code Civil, art. 1382-1384; Code de Commerce, art. 407; Valroger, Le Droit Maritime.)

Art. 216 of the Code de Commerce, defining the owner's liability, continues:

> "He can in any case free himself from the above named obligations by the surrender of the vessel and the freight. However, the right of surrender is *not* permitted to a party who is both *master* and owner or part owner of the vessel." (Translated in *Saunders, Maritime Law,* 2nd Ed., p. 445.)

The law of *Germany:* Commercial Code, sec. 527, provides that the master *cannot delegate the navigation* of the ship without personal liability to other persons (except in case of compulsory pilotage). (*Boyens-Lewis, Das Deutsche Seerecht,* vol. 1, p. 315.)

The law of *Holland:*

> "534. When a ship through the default of her commander *or crew* runs down, fouls or comes into collision with another, and does damage to her, the whole of the damage sustained by the ship and the goods on board her must be made good by the *commander* of the ship which has caused the damage. * * * The commanders must make good the loss sustained by the owners of the ships and goods and preserve their right to recover over from the officers and crews if these persons are to blame." (Translated in *Saunders, Maritime Law,* 2nd Ed., p. 447.)

In the laws of *Denmark, Norway, Spain, Mexico, Chile* and *Brazil,* the master seems to be personally liable for thefts and other injuries committed by the crew. (See 2 Boyens-Lewis, Das Deutsche Seerecht, p. 374.)

These illustrations refute cross-petitioners' argument that the responsibility of the shipmaster for

defaults of his subordinates is antiquated and has no place in modern maritime life.

CONCLUSION.

We believe that we have fairly shown that the authorities in English and American law relative to the liability of a shipmaster for navigational torts of subordinates are not in conflict; that there are sound reasons for these authorities, and that the change in the rule advocated by cross-petitioners would be in conflict with sound public policy.

The judgment against cross-petitioner McKinnon should be affirmed, with costs to cross-respondents.

Dated, San Francisco,
November 25, 1927.

Respectfully submitted,

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Counsel for Cross-Respondents.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1927.

Nos. 146 and 173.

HENRY WILSON, F. A. WILSON, W. T. WILSON, et al., *Petitioners,* vs. PACIFIC MAIL STEAMSHIP COMPANY, STEAMSHIP "NEWPORT", her engines, boilers, tackle, etc., and J. MCKINNON, Master of said vessel, *Respondents.*	No. 146
PACIFIC MAIL STEAMSHIP COMPANY, Claimant of the Steamship "Newport", her engines, boilers, tackle, etc., and J. MCKINNON, Master of said vessel, *Cross-Petitioners,* vs. HENRY WILSON, F. A. WILSON, W. T. WILSON, et al., *Cross-Respondents.*	No. 173

Supplementary Memorandum for Cross Respondents in Case No. 173.

The brief on behalf of the Svea maintains that enactments of other maritime nations hold the master respon-

sible for the torts of the crew. This may be true as to some other maritime nations. It is not true of all. The master is not so liable for example, in Belgium, Spain, Italy and Germany.

The Belgian Code of Commerce, Book II, Title VIII, Art. 230, specifically provides that in cases of collision

> "The commander incurs no personal liability unless there has been some default or neglect on his own part." (F. W. Raikes, The Maritime Codes of Holland and Belgium, p. 186, Effingham Wilson, London).

The Code of Commerce of The Kingdom of Spain, Book III, Title IV, Section III, Art. 826, provides that the *owner* of a vessel at fault for collision is liable for damages. In Section III (on Collisions) there is no mention of any personal liability of the master. (F. W. Raikes, The Maritime Codes of Spain and Portugal, p. 87, Effingham Wilson, London.) In the section on Commanders (ibid, p. 22), Art. 620 provides that a commander is liable *for his own defaults.*

In the Code of Commerce of Italy in the Chapter of Collisions, Book II, Title VIII, we find that Art. 661 provides that the ship is liable in damages for collision, and Art. 663 provides that the *actual wrongdoers* are also liable.

In the chapter on Commanders, Title II, we find that Art. 496 provides that the Commander is responsible *for his own defaults.* (F. W. Raikes, The Maritime Codes of Italy, Effingham Wilson, London.)

The Svea's brief (p. 36) asserts that the law of Germany provides that the master "cannot delegate the navi-

gation of the ship without personal liability to other persons (except in case of compulsory pilotage)." This is undoubtedly true and would be true under our law. (See, *The Oregon,* 158 U. S. 186.) But we submit that under the Commercial Code of Germany a shipmaster is *not* liable for the defaults of the mariners.

Art. 485 of the Commercial Code for the German Empire (The Commercial Code for the German Empire, Bernard A. Platt, Chapman & Hall, London) provides that the *owner* is responsible for any damage caused by a member of the crew to third parties.

Art. 734 provides that the *owner* of a vessel is liable for a collision caused through the fault of any one employed on the ship. The same article also provides that the persons actually at fault are also responsible.

Art. 511 provides that the *captain* is answerable for all damage occurring due *to his own fault.*

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

Nos. 146 and 173.—October Term, 1927.

146	Henry Wilson, et al., Petitioners, *vs.* Pacific Mail Steamship Company, Steamship "Newport", Her Engines, etc.; J. McKinnon, Master, etc.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.
173	Pacific Mail Steamship Company, Claimant of the Steamship "Newport", Her Engines, etc., and J. McKinnon, Master of said vessel, Petitioners, *vs.* Henry Wilson, et al.	

[April 9, 1928.]

Mr. Justice McReynolds delivered the opinion of the Court.

Twelve miles off the shore of California, 9:53 A. M., November 29, 1922, sky clear, sea smooth and uninterrupted, the *Newport*, an iron passenger steamer 337 feet long—2643 tons—drove her prow amidships into the port side of the *Svea*, a wooden lumber steam schooner of 618 tons and 170 feet long. Both vessels were seriously injured. The owners of the *Svea* libelled the *Newport*, her owners and master in the District Court, Southern District of California. They charged that the collision resulted from the sole fault of the *Newport* and her navigators and asked for full damages. A cross libel admitted fault, but claimed that the other vessel contributed and prayed for application of the half-damage rule.

The trial court concluded that the collision resulted solely from the gross negligence and plain fault of the *Newport* and granted a decree against her and the master—McKinnon—for all established damages. The Circuit Court of Appeals held there was mutual fault, divided the damages, and definitely declared that under the approved rule the master was responsible for the negligence of subordinates without regard to his personal fault.

Counsel for cross-petitioner McKinnon earnestly maintain that considering present conditions of navigation the master, when free from fault, ought not to be held liable for the action of others. But it is unnecessary now to discuss that question.

Here the record fails to disclose that the master met the exacting duties voluntarily assumed. An amazing casualty occurred while he commanded and presumably, at least, he participated in the admitted fault of his ship. Certainly, nothing short of very clear evidence of intelligent care could possibly absolve him.

The day was fine; the horizon ten miles away. The *Newport* was proceeding eastward at nine knots with the *Svea* off her starboard side steaming northward at eight knots. They were approaching each other upon crossing courses and in full view for more than half an hour. Twenty minutes before the collision Captain McKinnon quit the bridge of the *Newport*, leaving the third officer in charge. Of this subordinate he testified: "This young man was just keeping his first watch on ship; he just shipped the day before, and was making his first voyage." When upon the witness stand the Captain failed to show what, if any, directions he gave or that he took reasonable precaution to insure proper navigation in circumstances of obvious danger. He gave no excuse, nor did he indicate any necessity for leaving the bridge. It is impossible for us to say that he acted prudently.

The International Rules for Navigation at Sea (Act 1890, Ch. 802, 26 Stat. 327, Act 1894, Ch. 83, 28 Stat. 82; U. S. C., Title 33, Secs. 104, 106, 112, 121, p. 1055) direct—

> "Art. 19. When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.
>
> "Art. 21. Where, by any of these rules, one of two vessels is to keep out of the way the other shall keep her course and speed.
>
> "Note.—When, in consequence of thick weather or other causes, such vessel finds herself so close that collision can not be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision.
>
> "Art. 27. In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

"Art. 29. Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

The *Newport* kept her course and speed up to the moment of collision and it is admitted that in so doing she was at fault. But her counsel claim that the *Svea* also was at fault in holding her course and speed and that by acting differently she should have avoided the accident. The evidence does not support that view. Consideration must be given to the circumstances as they appeared at the time; not as they are now known. The *Svea* adhered to the fundamental rule. If in the difficult circumstances forced upon him her navigator, whose qualifications are not questioned, exercised his best judgment in not departing therefrom, the burdened vessel must accept the consequences. Having driven him into a perplexing situation, the *Newport* cannot complain because he failed to make the most judicious choice between the hazards presented.

Without stopping to set out the evidence, it is enough to say that we think there is no clear proof that the *Svea* failed in her duty. She tried in vain by repeated blasts to ascertain the *Newport's* intention. Her master could not possibly know the result of departing from the prescribed rule, and we cannot say that he acted indiscreetly in following it.

Big vessels may not insolently disregard smaller ones; super size gives no right to domineer. The *Newport* was a handy vessel. By porting her helm or reversing her engines two minutes or less before the collision occurred she could have avoided it easily. There was nothing to show that she would not do one of these things until too late for the *Svea's* master to maneuver his vessel into safety.

The applicable doctrine is plainly announced in The Delaware, 161 U. S. 459, 469—

"The cases of The Britannia, 153 U. S. 130, and The Northfield, 154 U. S. 629, must be regarded, however, as settling the law that the preferred steamer will not be held in fault for maintaining her course and speed, so long as it is possible for the other to avoid her by porting, at least in the absence

of some *distinct indication* that she is about to fail in her duty. If the master of the preferred steamer were at liberty to speculate upon the possibility, or even of the probability, of the approaching steamer failing to do her duty and keep out of his way; the certainty that the former will hold his course, upon which the latter has a right to rely, and which it is the very object of the rule to insure, would give place to doubts on the part of the master of the obligated steamer as to whether he would do so or not, and produce a timidity and feebleness of action on the part of both, which would bring about more collisions than it would prevent. Belden *v.* Chase, 150 U. S. 674; The Highgate, 62 L. T. R. 841; S. C. 6 Asp. Mar. Law Cases, 512."

The decree of the Circuit Court of Appeals in 146 is reversed and that of the District Court is affirmed. In 173 the decree of the Circuit Court of Appeals is affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.